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IN THE
Supreme Court of the United States

October Term, 1996

JOHN CONLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the positive law, either as promulgated by Congress or as promulgated pursuant to a valid delegation of lawmaking power, makes conspiracy to commit one specific offense punishable in accord with a more severe range of sentences than the range applicable to a conspiracy to commit another, less serious offense, do the Fifth and Sixth Amendments permit a judge rather than a jury to determine that he"finds the defendant guilty" of conspiracy to commit the more serious of the two offenses, and to impose sentence on the basis of that judicial finding of guilt?

2. Should USSG § 1B1.2(d) or the statute authorizing its promulgation be construed to permit such a judicial determination of guilt?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 92 F. 3d 157 (CA3 1996) and is reprinted as Appendix A at page A1. The underlying judgment of conviction and sentence in the United States District Court for the Western District of Pennsylvania is unreported. The District Court's "Tentative Finding of Fact" at issue in this appeal is unreported and is reprinted as Appendix B at page A29. The Order of the Court of Appeals denying rehearing and rehearing in banc is reprinted as Appendix C at page A35.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 1, 1996. A timely petition for rehearing was denied on August 30, 1996. See Appendix C at page A35. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [No person shall be] deprived of life, liberty, or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Title 18 United States Code § 371 provides in relevant part:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

United States Sentencing Guideline § 1B1.2(a), provides in relevant part that the sentencing court shall:

> Determine the offense guideline in Chapter Two [of the Guidelines Manual] (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted).

United States Sentencing Guideline § 1B1.2(d) provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Application Note 4 to United States Sentencing Guideline § 1B1.2 provides in relevant part:

> Subsectio[n] . . . (d) address[es] [a] circumstanc[e] in which the provisions of Chapter Three, Part D [of the Guidelines Manual] (Multiple Counts) [is] to be applied although there may be only one count of conviction. . . . Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit.

Application Note 5 to United States Sentencing Guideline § 1B1.2 provides in relevant part:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

The commentary that accompanied promulgation, in Amendment 75 to the Guidelines Manual, of USSG § 1B1.2(d) and application notes 4 and 5 provides in relevant part:

> Additional commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. . . . In order to maintain consistency with other § 1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter 3, Part D (Multiple Counts).

United States Sentencing Guideline § 3D1.3(a) provides:

> In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.

STATEMENT OF THE CASE

Petitioner John Conley operated a video poker machine business in Western Pennsylvania. His machines were placed in bars, taverns, restaurants, coffee shops, social halls of fraternal and veterans' organizations, and similar locations in Allegheny, Beaver, Washington, Westmoreland and other counties. Despite the fact that, pursuant to local ordinances, he obtained licenses and permits from, and paid fees or charges to the vast majority of the cities, boroughs, townships and other municipalities in which his video poker machines were placed, federal prosecutors on September 26, 1991 obtained an indictment charging him in Count One with a multi-object conspiracy in violation of 18 U. S. C. § 371, which prohibits "conspir[acy] . . . to commit any offense against the United States." See generally *United States* v. *Conley*, 859 F. Supp. 909 (W.D. Pa. 1994) (describing the treatment of video poker machines as legal by some municipalities and Conley's openness in operating and promoting his business).

Count One charged that he conspired *either* (a) to conduct an illegal gambling business in violation of the laws of Pennsylvania and, consequently, of 18 U. S. C. § 1955, which prohibits "conduct[ing]" certain "gambling business[es]" that are "a violation of the law of a State or political subdivision in which [they are] conducted," *or* (b) to launder the proceeds in order to promote the illegal gambling business in violation of 18 U. S. C. § 1956(a)(1)(A), which, among other things, prohibits any person who "know[s] that the property involved . . . represents the proceeds of some form of unlawful activity" from "conduct[ing] or attempt[ing] to conduct . . . a financial transaction which in fact involves the proceeds" of an unlawful gambling business "with the intent to promote the carrying on of" that business. Count

Two charged Conley with operating an illegal gambling business in violation of 18 U. S. C. §§ 1955 and 2. This original indictment also included an additional 27 counts, 20 of which named Conley as a defendant. Several of these were dismissed by the District Court in 1993, see *United States* v. *Conley*, 826 F. Supp. 1536 (W.D. Pa. 1993), and the Government subsequently informed the district court that it would proceed to trial only on Counts One and Two of the original indictment. On August 4, 1994, federal prosecutors obtained a second indictment charging Conley with 15 counts of money laundering in violation of 18 U. S. C. §§ 1956(a)(1(A) and 2. The district court consolidated the two indictments for trial.

Conley was tried twice. His first trial ended in a mistrial when the jury was unable to agree on a verdict as to any of the charged counts.

At his second trial, Conley requested (as he had at his first trial) that the jury be given a special verdict form with respect to the conspiracy count, so that, in the event he was convicted of conspiracy, the jury could indicate whether it had convicted him of conspiracy to launder money or of conspiracy to operate an illegal gambling business. See CA3 App. 5516-5519 (Defendant's Proposed Supplemental Jury Instruction No. 10). The trial judge denied this request. See Transcript of Proceedings on June 16, 1995 at 17, *United States* v. *Conley*, Crim. Nos. 91-178 and 94-182 (W.D. Pa.), reprinted in Appendix D at page A37.

Because "the object of a conspiracy constitutes an essential element of the conspiracy offense," e.g., *United States* v. *Gallerani*, 68 F. 3d 611, 617-618 (CA2 1995) (quoting *United States* v. *Roshko*, 969 F. 2d 1, 5 (CA2 1992)); *United States* v. *Schramm*, 75 F. 3d 156, 163 (CA3 1996), the trial judge instructed the jury that it could find Conley guilty of the conspiracy with which he was charged in Count One if they found that *either one* of the charged

objects had been proved beyond a reasonable doubt, so long as they agreed "unanimously as to which objective of the conspiracy the defendant agreed to accomplish." CA3 App. at 5144.

During its deliberations, the jury submitted a question to the court asking whether it was an essential element of the conspiracy charge that Conley have conspired "to operate an illegal gambling business *and* to launder proceeds" or whether the defendant could be convicted if he conspired to operate an illegal gambling business "*and/or*" to launder proceeds. See Jury Question No. 1. reprinted in Appendix E at page A39 (citing Jury Instructions pages 29 and 33 reprinted in Appendix F at pages A41 and A45). The district court replied:

> You only need to find that the defendant conspired or agreed to accomplish one of the objectives of the conspiracy to convict him of conspiracy. If you find that only one objective of the conspiracy has been proven beyond a reasonable doubt, however, you must agree unanimously as to which objective of the conspiracy the defendant agreed to accomplish.

Answer to Question No. 1 reprinted at App. A39-40.

Because the jury's question suggested that — indeed was only relevant if — the jury had concluded that Conley was guilty of conspiracy to commit only one object offense, Conley's counsel again raised the issue of submitting a special verdict slip to the jury:

> MR. JANAVITZ: [H]ere's where I foresee the problem on the conspiracy, because it is going to raise its ugly head again, and this is why I asked, both the last time and this time, that a separate slip be — that a special verdict slip be prepared in terms of which they found so that the Court will know without having

to make a blind finding later if they find guilt of conspiracy . . . just which one they did.

CA3 App. 5178-5179, reprinted in Appendix G at pages A47-48. The Court replied:

THE COURT: First of all, it's improper for me to do that. I'm required under the Sentencing Guidelines to make that determination . . . . So, under the guidelines, I make that determination later. If they find him guilty of Count 1, then it's up to me, and me only, to make that determination.

Id., at 5179 reprinted at App. A48-49. The Government also took the position at trial not only that it opposed the court's submission of a special verdict form to the jury, but that the trial judge was without authority to submit one. The colloquy continued:

THE COURT: What's your position on that?
MR. WILSON: I have nothing to add to that, Judge.
THE COURT: Well, do you agree with that?
MR. WILSON: Yes. Absolutely. We discussed this before.

Id., at 5179-5180 reprinted at App. A49.

Subsequently, the jury delivered a general verdict of guilty to the conspiracy charge. The second trial ended with a conviction only on Counts One and Two of the first indictment. The jury was again unable to reach a verdict on the fifteen money-laundering counts in the second indictment and the district court again declared a mistrial with respect to those counts.

Conley's sentence was calculated under the United States Sentencing Guidelines. Under USSG §3D1.2, "[a]ll counts involving substantially the same harm" because they "constitut[e] part of a common scheme or plan" must "be

grouped together into a single Group." Under USSG § 3D1.3(a), the Guidelines "offense level applicable to a Group is the offense level . . . for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group."

The first step in determining an offense level applicable to a count of which a defendant has been convicted is determining the base offense level for that count. USSG § 1B1.2(a) provides the general rule that the sentencing court must "[d]etermine the offense guideline section in Chapter Two [of the Guidelines Manual] (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." The offense guideline section applicable to conspiracy provides that the base offense level to be applied in a conspiracy case is the base offense level for the offense that was the object of the conspiracy. See USSG § 2X1.1.

The Guidelines thus make the base offense level in a conspiracy case turn on the precise offense of conviction: conviction on a count of conspiracy to commit one offense will result in a different base offense level from that resulting from conviction on a count of conspiracy to commit another, more serious offense.

As to multi-object conspiracies, USSG § 1B1.2 was amended effective November 1, 1989, to include a subsection (d) that provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

USSG § 1B1.2(d). The base offense level in this context, too, thus turns on the defendant's particular offense of

conviction, something that is itself dependent on the object offense or offenses found by the jury.

In some multi-object conspiracy cases, of course, it will be clear from the verdict which object offense or offenses were found by the jury. In these cases it can be said with certainty that the jury has convicted the defendant of conspiracy to commit a particular object offense. That conviction then automatically yields a base offense level on the basis of which the defendant will be subject to a determinate sentencing range.[1]

In cases such as Conley's, however, the jury verdict does *not* establish which offense was the object of the conspiracy of which the defendant was convicted by the jury. It is impossible to determine whether the jury convicted the defendant of conspiracy to commit one or another of the charged object offenses — an impossibility that the defendant in this case tried to prevent *ex ante* by making a request, denied by the district court and opposed by the Government, that the jury be permitted to deliver a special verdict. Cf., *e.g.*, *United States* v. *Todd*, 920 F. 2d 399, 407 (CA6 1990) ("The use of a special interrogatory is proper when a conspiracy has two objects.").

The Sentencing Commission purported to deal with the situation presented by this case — a situation in which one cannot tell whether the jury has convicted the defendant of conspiracy to commit one offense, of conspiracy to commit

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[1] The precise sentencing range may of course depend as well on the presence or absence of other offense or defendant characteristics and will always depend also on the defendant's criminal history category, see, e.g., USSG § 1B1.1 (Guidelines Application Instructions), but it will be determinate nonetheless. See *Mistretta* v. *United States*, 488 U. S. 361, 368 (1989) (Guidelines were meant to "establish a range of determinate sentences for categories of offenses and defendants according to various [congressionally] specified factors, among others.") (internal quotation marks and citations omitted).

another, or of conspiracy to commit both — in commentary to § 1B1.2 promulgated contemporaneously with subsection (d). See USSG § 1B1.2, comment., n. 5. Such commentary has been held by this Court to be "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, th[e relevant] guideline." *Stinson* v. *United States*, 508 U. S. 36, 38 (1993). Application Note 5 to Guideline § 1B1.2 requires the district court — and not the jury — to determine, under a beyond a reasonable doubt standard, whether the defendant is guilty of conspiracy to commit each of the charged object offenses. It provides:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict . . . does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

USSG § 1B1.2, comment., n. 5.

Under the procedure for applying USSG § 1B1.2(d) described in Application Note 5, the district court, and not the jury, creates a new count of conviction for purposes of Guidelines Sections 3D1.2 and 3D1.3. The defendants' base offense level — and thus ultimately a determinate sentencing range — is determined on the basis of this judicially-imposed count. The Sentencing Commission recognized exactly this, stating in commentary that accompanied the promulgation of Application Note 5 that the application note

> is provided to address cases in which the jury's verdict

> does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. . . . In order to maintain consistency with other § 1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern *the creation of what is, in effect, a new count of conviction* for the purposes of Chapter 3, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were 'sitting as a trier of fact.'

See United States Sentencing Commission, Guidelines Manual, App. C., Amend. 75 (1995 USSG) (emphasis added).

Having denied Conley's request for a special verdict that would have permitted the jury to express its findings regarding conspiracy to commit each charged object offense, the district court addressed the resulting ambiguous verdict — in a written order issued almost three weeks after the jury's verdict — by applying the procedure described in Application Note 5 and, in the district court's own words, making a "ruling with regard to whether the Court finds the defendant guilty of conspiracy to commit money laundering." App. A30.

Despite the jury's question — which would only have been relevant had Conley been thought guilty of conspiracy to commit only one of the object offenses — and its failure to convict Conley on the money laundering counts, the district court, "[e]mploying a 'beyond a reasonable doubt' standard," found "that the defendant and his co-conspirators adhered to and/or conspired to commit both of the objects alleged in Count One of the indictment . . . that is, they conspired to operate and conduct an illegal

gambling business and to launder the proceeds thereof." See App. A33.

Pursuant to this district court finding of guilt, Conley's offense level, and consequently his punishment range, was calculated in the presentence report on the basis that he had committed "Conspiracy to Commit Money Laundering *and* Illegal Gambling." PSI at 8 (emphasis added). Under the Guidelines described above, these were treated as a conviction for two separate counts, the two counts were grouped, and the offense level for the Group was determined by "the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group." See USSG §3D1.3(a).

Since the ultimate offense level in his case depended upon the base offense level, and since the base offense level for conspiracy counts is the base offense level for the object offense, Conley was given the more serious of the base offense levels for conducting a gambling business and for laundering money. The base offense level for conducting a gambling business is 12. See USSG §2E3.1. The base offense level for money laundering is 23. See USSG §2S1.1. The presentence report calculated the guideline sentence on the basis of the latter base offense level.

The money laundering base offense level in Conley's case was increased in the presentence report by an additional 9 levels on the basis that Conley had conspired to launder more than $10,000,000. See USSG §2S1.1(b)(2). This raised Conley's offense level to 32, 20 levels higher than it would have been in the absence of the court's finding that he conspired to commit the more serious of the two offenses that were alleged as objects of the conspiracy.

After an additional adjustment of six levels,[2] the district court concluded that the Guidelines mandated a sentencing range for Conley of 235-293 months (19 years and seven months to 24 years and five months). Because the statutory maximum penalty under each of Count One and Count Two was five years imprisonment, the district court — applying USSG §5G1.2, which provides for consecutive sentences only when concurrent sentences are not adequate to achieve the punishment provided for by the Guidelines — sentenced Conley to consecutive maximum five year sentences, for a total of 10 years imprisonment.[3]

By contrast, had the district court treated his conviction under the conspiracy count as one for conspiracy to engage in an illegal gambling business, even assuming Conley would have been subject to the same upward adjustments made by the district court, see supra n. 2, the Guidelines would have permitted Conley to be sentenced to, at most, 27-33 months imprisonment (two years and three months to two years and nine months) — at least seven years and

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[2] The presentence report imposed a further increase of four offense levels because of Conley's leadership or organizational role, see USSG §3B1.1, giving a total offense level of 36. The presentence report fixed Conley's criminal history at I, the lowest level. The district court with one exception accepted the presentence report and overruled the objections of both Conley and the Government. It did, however, increase Conley's total offense level by two on the basis that he impeded or obstructed justice within the meaning of USSG §3C1.1. The court thus determined that Conley's total offense level was 38 and that his criminal history category was I.

[3] The original presentence report overlooked Conley's conviction on Count Two, the gambling business count. The probation office, however, provided the court with a supplement to the presentence report, which concluded that Count Two would have been grouped with Count One under USSG §3D1.2(b), and that the Guidelines for the most serious grouped offense, conspiracy to commit money laundering, would still control. Conley was also fined $1,000,000.00.

three months less than the sentence he actually received.

On appeal, the United States Court of Appeals for the Third Circuit affirmed the sentence calculated on the basis of the base offense level for conspiracy to launder money. Two members of the Third Circuit panel concluded that "permitting the court to determine for sentencing guideline purposes the objects of a conspiracy charged in an indictment under 18 U. S. C. § 371 if the jury finds the defendant guilty in a general verdict does not violate the Sixth Amendment." App. A18.[4] This court majority acknowledged that "[m]ost courts . . . have held that the punishment imposed after a general jury verdict of guilty in a multi-object conspiracy cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects if the punishment authorized by the conspiracy statute depends on the punishment provided for the substantive offense or offenses which were the object or objects of the conspiracy." App. A11 (citing *inter alia* *United States* v. *Orozco-Prada*, 732 F. 2d 1076, 1083-1084 (CA2), cert. denied 469 U. S. 845 (1984); *United States* v. *Quicksey*, 525 F. 2d 337 (CA4 1975), cert. denied, 423 U. S. 1087 (1976); *United States* v. *Fisher*, 22 F. 3d 574, 576-577 (CA5), cert denied, 115 S. Ct. 529 (1994); *United States* v. *Garcia*, 37 F. 3d 1359, 1371 (CA9 1994), cert, denied, 115

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[4] The majority consequently held that USSG § 1B1.2(d) itself does not violate the Sixth Amendment. App. A18. The court did not explore the possibility of avoiding the constitutional question by construing USSG § 1B1.2(d) or the statute authorizing its promulgation to prohibit sentencing on the basis of the base offense level for the more serious object offense. Cf., e.g., *Edward J. De Bartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); *Greene* v. *McElroy*, 360 U. S. 474, 507-508 (1959). While this question is a "subsidiary question fairly included" within the first Question Presented in this petition, see S. Ct. R. 14(a), for clarity it has also been set out separately as a second Question Presented.

S. Ct. 1699 (1995); and *Brown* v. *United States*, 299 F. 2d 438, 440 (CADC), cert. denied, 370 U. S. 946 (1962) (per Burger, J.)). The majority concluded, however, that that same rule did not apply where different sentences for conspiracy — depending upon the object offense — are mandated not by Congress in statutory law, but by the Sentencing Commission (pursuant to a valid delegation of congressional power, see *Mistretta*, 488 U. S., at 371-379) in the Guidelines fixing the base offense level. App. A13-14.

The majority acknowledged that there was support in *United States v. Pace*, 981 F. 2d 1123, 1128-30 (CA10 1992), cert. denied, 507 U. S. 966 (1993), *United States* v. *Bush*, 70 F. 3d 557, 561 (CA10 1995), cert. denied, 116 S. Ct. 795 (1996), and *United States* v. *Owens*, 904 F. 2d 411 (CA8 1990), for the contrary proposition that "the rule requiring use of the penalties for the least onerous predicate offense in sentencing after general guilty verdicts in multi-object conspiracy cases should apply to calculations under the sentencing guidelines." See App. A14. The majority recognized that, had the district court submitted a special verdict form to the jury, sentencing under Guideline § 1B1.2 would have been controlled by the jury's finding beyond a reasonable doubt of the object of the conspiracy. See App. A20. The court also acknowledged that it was impossible to determine whether the jury had found that Conley was "guilty on the conspiracy money laundering charge," and that, indeed, it "may not have reached a conclusion on the point." App. A19. But the majority nonetheless concluded, after holding that it had been permissible for the district court to decline to submit a special verdict form to the jury, App. A20, that the district court's *own* "beyond a reasonable doubt" finding about the object of the conspiracy — the finding ultimately used in the base offense calculation — was a "determinatio[n] germane to sentencing" rather than a finding of "an element of the

crime." App. A16-20.

These two members of the Third Circuit panel reasoned by analogy to *United States* v. *Martinez*, 924 F. 2d 209 (CA11), cert. denied, 502 U. S. 870 (1991), in which the Eleventh Circuit held that a sentence may be enhanced by the district court under Guidelines § 2D1.1(b)(1) even on the basis of uncharged relevant conduct. See App. A17-18. The court majority consequently held that the finding beyond a reasonable doubt, by the district court rather than the jury, of the object of the conspiracy did not infringe Conley's Sixth Amendment right to have a jury find each element of the crime beyond a reasonable doubt. App. A17, A18.

Judge McKee concluded that the majority's decision was in error, and in conflict with the analysis employed by other Courts of Appeals in *United States* v. *Bush*, 70 F. 3d at 561-562, and *United States* v. *Garcia*, 37 F. 3d at 1369-71. He concluded, however, that he was bound by the reasoning of the Third Circuit's earlier decision in *United States* v. *Ryan*, 866 F. 2d 604, 608-609 (CA3 1989), in which the court had held that an upward departure from the mandated Guidelines range is permitted on the basis of conduct that was neither formally charged nor an element of the offense of conviction. See App. A19, n. 9 (citing Third Circuit Internal Operating Procedure 9.1 which provides "It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels.").

The Court of Appeals also rejected Conley's argument that, because the sentencing court and not the jury determined beyond a reasonable doubt that he had committed conspiracy to launder money, his sentence violated the Fifth Amendment as construed by this Court in *In re Winship*, 397 U. S. 358 (1970). See App. A20. The court concluded that the beyond a reasonable doubt standard applied by the district court provided Conley all

the protection to which he was constitutionally entitled. See App. A21.

The Court of Appeals subsequently denied Conley's timely petition for rehearing and rehearing in banc. Judge McKee, however, dissented from the court's denial of rehearing in banc. See App. A36.

REASONS FOR GRANTING CERTIORARI

1. The Circuit Courts of Appeals are divided on the question whether the Fifth and Sixth Amendments prohibit a district court from applying the Guidelines punishment mandated for conviction for conspiracy to commit the more serious offense in a case such as this — a case in which, because the jury has returned only a general verdict of guilty to a conspiracy count in which more than one unlawful object has been charged, it is impossible to determine whether the jury convicted the defendant of conspiracy to commit the greater object offense or only of conspiracy to commit the lesser object offense.

The object offense is an essential element of the federal crime of conspiracy. See, e.g., *United States* v. *Gallerani*, 68 F. 3d at 617-618 (quoting *United States* v. *Roshko*, 969 F. 2d at 5); *United States* v. *Schramm*, 75 F. 3d at 163. In cases such as the instant one, therefore, it is impossible in the absence of a special verdict to tell precisely what offense the jury found the defendant to have committed. In this case, for example, the general verdict means that the jury might have found Conley guilty only of conspiracy to run a gambling business, or guilty only of conspiracy to launder the proceeds thereof, or guilty of both. To impose the punishment mandated under positive law only for a conviction for conspiracy to commit the more serious offense necessarily requires the district court to make a finding of guilt that may constitutionally be entrusted to the jury alone — in effect, to impose a count of conviction.

Indeed, in this case, having refused the defendant's request for a special verdict, the district court, employing the procedure described in Application Note 5 to USSG § 1B1.2, and stating that it was "mak[ing] a ruling with regard to whether the Court finds the defendant guilty of conspiracy to commit money laundering," App. A30, did what the Sentencing Commission has explicitly described in just those terms. See United States Sentencing Commission, Guidelines Manual, App. C., Amend. 75 (1995 USSG).

At least two other federal Courts of Appeals to consider the precise question presented in this case, the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Tenth Circuit, have held that in circumstances such as this, where it is unclear of which offense the defendant was found guilty and where the two possible offenses would result in two different sentences under the Guidelines, the Fifth Amendment right to a finding by the jury that *each element* of the offense has been proven beyond a reasonable doubt, and the Sixth Amendment right to trial by jury, each require the district court to choose the lower offense level. Cf. *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) ("The Fifth Amendment . . . and the Sixth . . . require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

As the Tenth Circuit Court of Appeals has put it, "if a jury returns a general verdict which does not specify the object of a conspiracy, the defendant must be sentenced on the basis of the objective yielding the lowest offense level." *United States* v. *Bush*, 70 F. 3d 557, 561 (CA10 1995). This was that court's holding in *United States* v. *Pace*, 981 F. 2d 1123 (CA10 1992). There two defendants were charged in a single count under 21 U.S.C. §846 with conspiracy to

possess with intent to distribute either amphetamine or methamphetamine in violation of 21 U.S.C. §841(a)(1). They were found guilty by a general verdict that left an ambiguity as to which object the jury had found. The district court determined the base offense level under the Guidelines based on the object that resulted in the more serious sentence under the Guidelines, possession with intent to distribute methamphetamine.

The Court of Appeals reversed. It held that "because the jury might have convicted defendants based on conspiracy to possess with intent to distribute amphetamine" — an object that would have resulted in shorter sentences — "we hold that defendants' sentences cannot stand." 981 F. 2d at 1129. As the Court of Appeals later explained, "because the object of a conspiracy is an element of the offense, the Fifth and Sixth Amendments require a jury to determine all facts necessary to establish the existence of the object of the conspiracy, and the government must prove it beyond a reasonable doubt." *Bush*, 70 F. 3d at 561. Consequently, imposing upon a defendant found guilty by a general verdict of a multi-object conspiracy the sentence mandated for conviction of any object other than "that yielding the lowest offense level . . . would . . . violat[e] the Fifth and Sixth Amendments by taking the issue away from the jury and placing it in the hands of the judge." *Id.*, at 561-562.

In extraordinarily similar circumstances the Eighth Circuit Court of Appeals in *United States* v. *Owens*, 904 F. 2d 411 (CA8 1990), invalidated a sentence based on the more serious object of a conspiracy again involving either amphetamine or methamphetamine. In that case, as in the instant one, the district court made a finding that the object of the conspiracy was the one that yielded the higher offense level under the guidelines — there the manufacture or attempted manufacture of

methamphetamine. See *id.*, at 413. The Court of Appeals reversed. The court concluded that "the establishment of Owens's base offense level required a determination of which drug the conspiracy involved." *Id.*, at 415. The court held that this determination must be made by the jury and *not* by the sentencing judge.

> By instructing the jury on an 'either/or' basis with respect to the substances and by failing to enable the jury to indicate which of the substances it found the conspiracy to have involved, the district court elicited an ambiguous verdict of guilty with two possible interpretations. Under the circumstances of this case, the district court erred in sentencing Owens based on the alternative which yielded a higher sentencing range.

Id., at 415.[5]

2. The fact that the Court of Appeals here purported to operate under the authority of Application Note 5 to Guidelines §1B1.2(d) does not alter the fact that the Circuit Courts of Appeals are divided on the constitutional permissibility of imposing sentence in this context for any but the lesser offense. Commentary by the Sentencing

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[5] In the Fifth Circuit there is an intra-circuit conflict among different panels of the Court of Appeals on the question presented in this case. At least one panel decision in that Circuit squarely conflicts with the decision below. Compare *United States* v. *Bounds*, 985 F. 2d 188, 194-195 (CA5), cert. denied, 510 U. S. 845 (1993) (concluding in reliance on the Eighth Circuit's *Owens* decision that use of the Guideline range for the more serious offense is impermissible when it is impossible because of a general verdict to determine which object offense was found by the jury), with *United States* v. *Fisher*, 22 F. 3d 574, 576-577 (CA5 1994) (sentence based on the more serious object permissible so long as statutory maximum for offense carrying the least penalty is not exceeded); *United States* v. *Cooper*, 966 F. 2d 936, 940-942 (CA5), cert. denied, 506 U. S. 980 (1992) (same).

Commission cannot alter the requirements of the Constitution. Indeed, in *Bush*, the Tenth Circuit— relying on analysis contained in dictum in the Ninth Circuit's opinion in *United States* v. *Garcia*, 37 F. 3d 1359 — explicitly reaffirmed in the face of Application Note 5 the approach to sentencing it adopted in *Pace*:

> The United States Sentencing Guidelines . . . support a different result [from *Pace*]. . . . The Ninth Circuit recently rejected the approach set forth in USSG § 1B1.2(d), comment. (n.5), and reaffirmed the analysis we used in *Pace*. [The Ninth Circuit's *Garcia* decision involved a conspiracy in which the charged objects included violation of both 21 U. S. C. § 841(a) and 21 U. S. C. § 843(b).] Although *Garcia* was a pre-guidelines case [because the criminal conduct took place prior to the effective date of the Guidelines], the court stated in dictum that it would have been unconstitutional to give Mr. Garcia the remedy authorized under USSG § 1B1.2(d), comment. (n.5). *Garcia*, 37 F. 3d at 1371, n.4. It would have been unconstitutional because 'An element of the crime of conspiracy under [21 U.S.C.] § 846 is that the conspiracy must be to commit an offense under the Drug Abuse Prevention and Control subchapter,' which includes 21 U.S.C. § § 841(a) and 843(b). *Garcia*, 37 F. 3d at 1370; see also *United States* v. *Sullivan*, 919 F. 2d 1403, 1435 (10th Cir. 1990). Because the object of a conspiracy is an element of the offense, the Fifth and Sixth Amendments require a jury to determine all facts necessary to establish the existence of the object of the conspiracy, and the government must prove it beyond a reasonable doubt. Thus, the procedure authorized in USSG § 1B1.2(d), comment. (n.5) would have violated the Fifth and Sixth Amendments by taking this issue

> away from the jury and placing it in the hands of the judge. We agree with the Ninth Circuit's analysis in *Garcia* and reaffirm the remedy we announced in *Pace*.

Bush, 70 F. 3d at 561-562 (footnote and citations omitted).[6] See also *Garcia*, 37 F. 3d at 1371 n.4.

3. Neither the Eighth Circuit nor the Tenth Circuit authority cited above turned on the imposition of a sentence higher than the *statutory* maximum for conspiracy to commit the less serious object offense.[7] As the Court of Appeals noted below, App. A11-12, there is a line of cases prohibiting imposition of a sentence greater than the lower statutory maximum for the lesser object offense where the statutory maxima depend on the object offense. See *United States* v. *Garcia*, 37 F. 3d at 1371 (CA9 1994) (sentence greater than the statutory maximum for conspiracy to commit the lesser offense must be reversed where ambiguity because of a general verdict makes it impossible to know the object offense found by the jury and

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[6] And, indeed, although *Pace* itself did not explicitly address Application Note 5, the sentencing at issue in that case was undertaken after that application note's effective date. The Guidelines provide that, unless the Ex Post Facto clause of the Constitution prohibits it, courts are bound to employ the Guidelines Manual in effect on the date the defendant is sentenced. See USSG § 1B1.11. Those Courts of Appeals to address the issue have concluded that the retroactive application of Guideline § 1B1.2(d) does not violate the Ex Post Facto clause because subsection (d) did not work a substantive change in the law under the Guidelines, but "was enacted for [the] sole purpose of clarifying then existing procedure." *United States* v. *Golden*, 954 F. 2d 1413, 1418 (CA7 1992); *United States* v. *Kimmons*, 965 F. 2d 1001, 1005-1006 (CA11 1992), cert. denied, 506 U. S. 1086 (1993).

[7] Title 21 U. S. C. § 846 provides that the penalties for conspiracy to commit an offense under the Drug Abuse Prevention and Control subchapter "shall be . . . the same penalties as those prescribed for the [object] offense."

thus the statutory maximum punishment); *United States* v. *Orozco-Prada*, 732 F. 2d at 1083-1084 (CA2 1984) (same); *United States* v. *Quicksey*, 525 F. 2d at 340 (CA4 1975) (same); *Brown* v. *United States*, 299 F. 2d at 440 (CADC 1962) (per Burger, J.) (same); see also *United States* v. *Cooper*, 966 F. 2d at 940 (CA5 1992).

The decision below cannot be squared in principle with these cases: the Court of Appeals' attempt to distinguish them is unavailing because it is irrelevant whether the positive law that imposes the determinate sentencing range is adopted by Congress or by the Sentencing Commission pursuant to a valid delegation of congressional authority.[8]

But we need not rely upon any of these cases to demonstrate the split in authority of which petitioner Conley complains. For the Tenth and Eighth Circuit cases described above hold that it is not permissible to determine a defendant's base offense level under the Guidelines on the basis of conspiracy to commit the object of the offense that results in the higher sentence when it is not possible to determine which object was found by the jury. The Tenth and Eighth Circuit cases thus are squarely in conflict with the decision below, whatever one may think of the decisions of the Second, Fourth, Ninth and District of Columbia Circuits.

4. The split in authority here involves a question of sufficient importance to warrant review by this Court. As

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[8] The Guidelines "have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed, 18 U. S. C. § 3742." *Mistretta* v. *United States*, 488 U. S. 361, 413 (Scalia, J., dissenting). The authority by which the Sentencing Commission promulgates the Guidelines is, of course, the legislative authority. See *id.*, at 371-379 (opinion of the Court) (upholding the delegation of congressional power); see also *id.*, at 386 n. 14 ("rulemaking power originates in the Legislative Branch"); *id.*, at 385 (Sentencing Commission "does not exercise judicial power.").

the Government has previously asserted before this Court, a disagreement among the Courts of Appeals concerning the meaning of a general verdict of guilty in a multi-object conspiracy has "great practical importance," see Brief for the United States in Response to the Petition for Certiorari at 8, *Griffin* v. *United States*, 502 U. S. 46 (1991) (No. 90-6352) (supporting the petition for certiorari). As the Government put it:

> The federal government frequently prosecutes multi-object conspiracies in connection with the laws governing controlled substances, racketeering, securities, and financial institutions.

Id.

The conflict among the Courts of Appeals implicated in this case thus potentially affects a very large number of significant federal cases. Perhaps the best measure of the importance of the question presented here is the very fact that when the use of multi-object conspiracy counts led previously to a dispute concerning the meaning of general guilty verdicts rendered by juries — and to a consequent split among the Courts of Appeals — this Court did not hesitate to give the question its attention. See *Griffin* v. *United States*, 502 U. S. 46 (1991).

5. As to the merits, the approach taken by the court below in characterizing the object offense as a "sentencing factor" rather than an element of the offense does nothing to support its decision. In conspiracy cases the Guidelines utilize the particular offense of conviction, of which the object offense is an *element*, to establish the base offense level. "The Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime." *Gaudin*, 115 S. Ct., at 2318 (emphasis in original). Furthermore, in this case the punishment that federal law prescribes for a conviction for conspiracy to launder money is significantly more

serious than the punishment federal law prescribes for a conviction for conspiracy to operate an illegal gambling business. Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975) (fact that distinguishes murder from manslaughter must be found by the jury beyond a reasonable doubt because "the fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly."). Where there is ambiguity as to what the jury has found, a *judicial* finding such as that made in this case that the defendant "is guilty of" conspiracy to commit the more serious object offense, App. A30, amounts to the imposition by a judge, and not by a jury, of a count of conviction.

Indeed in adopting Application Note 5 to Guideline § 1B1.2, the Sentencing Commission itself recognized, in an authoritative explanation of the Guidelines, that it was calling upon courts in essence to impose such a count of conviction:

> In order to maintain consistency with other § 1B1.2(a) determinations, this decision [concerning which was the object offense] should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction . . . .

United States Sentencing Commission, Guidelines Manual, App. C., Amend. 75 (1995 USSG).[9] See also *Bush*, 70 F.

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[9] See *Stinson* v. *United States*, 113 S. Ct. at 1915 ("commentary . . . that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"); *id.*, at 1918 ("Portions of [the Guidelines Manual] not labeled as guidelines or commentary . . . are to be construed as commentary and thus have the force of policy statements") (quoting USSG § 1B1.7, comment).

3d at 562 n. 4 ("The Sentencing Commission appears to have been aware USSG § 1B1.2(d), comment. (n.5) was open to constitutional attack . . . . [A]lthough the Sentencing Commission selected the constitutionally appropriate standard of proof, it assigned the issue to the wrong trier of fact."). It is perhaps because the Guidelines do authorize the creation of a new count of conviction that Application Note 5 to USSG § 1B1.2(d) is the *only* place in any of the Guidelines or commentary where the Sentencing Commission has called upon the trial court after a jury trial to make a finding under the "reasonable doubt" standard.

And of course the particular facts in this case present an unusually clear picture of the trial court exercising what is properly the jury's power — here, the power to determine whether the defendant was guilty of conspiracy to launder money. The trial judge here actually concluded — with the Government's agreement — that the Guidelines had stripped him of the authority to use the only mechanism by which it could be established whether the jury had convicted Conley of conspiracy to commit that offense, a special verdict form. CA3 App. 5179. But cf., *e.g.*, *United States* v. *Todd*, 920 F. 2d 399, 407 (CA6 1990) ("The use of a special interrogatory is proper when a conspiracy has two objects."). He concluded that the very determination of guilt — which he characterized as "a ruling with regard to whether the Court finds the defendant guilty of conspiracy to commit money laundering," App. A30 — was "up to me, and me only." CA3 App. 5179.[10]

Describing after the fact one of the essential elements of

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[10] Of course the worthiness for review by this Court of the Questions Presented in this case does not depend on the trial court's erroneous conclusion that it was precluded from submitting a special verdict form to the jury. That error merely highlights with particular clarity the nature of the determination of guilt made by the trial court in this case.

the offense of conviction as a mere "sentencing consideration" does not make it so. Indeed, even if the Guidelines *had* attempted to denominate the object offense as a mere sentencing factor, it would run afoul of this Court's proscription on government's avoidance of its constitutional responsibilities by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney*, 421 U. S., at 698.[11]

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[11] In describing the district court's finding as a mere "sentencing consideration," the Court of Appeals's reliance on *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), see App. A15-16, was plainly in error. In *McMillan* this Court held that it was permissible for a state to treat a fact that could have been, but was not, made an element of an offense — in that case visible possession of a firearm — as a consideration in sentencing, without requiring that it be proven beyond a reasonable doubt. The Court held that, within some limits, the States may define the elements of the offenses it chooses to criminalize. The State did not make visible possession of a firearm an element of any of the offenses at issue there. Here, by contrast, there can be no serious dispute that the object offense is an essential element of unlawful conspiracy.

Neither does this Court's opinion in *Griffin* v. *United States*, 502 U. S. 46 (1991), on which the Court of Appeals purported to rely in its decision to characterize the object offense as a "sentencing factor rather than as an element of the crime," App. A16, provide it any support. *Griffin* had nothing to do with a court's power to impose a count of conviction on a defendant nor, indeed, with the question of whether the object offense charged in a conspiracy count is to be understood as a mere "sentencing factor." *Griffin* held only that conviction on a multi-object conspiracy count may be upheld even where the evidence is insufficient as to one of the object offenses so long as there is sufficient evidence to support another one of the object offenses. *Griffin* does not suggest that the object offense is not an element of the crime of conspiracy, or that a court's determination of guilt of an object offense may substitute for that of the jury. Indeed, the need for proof of one or another of the object offenses is premised on the proposition of law that the object offense *is* an essential element of the crime. Thus, the Court of Appeals seems to be making an elementary mistake of logic when it

The Guidelines of course do call in some circumstances for other relevant conduct, some of which may not itself even be unlawful, to be considered in making adjustments to the base offense level. See, e.g., USSG Chapter 3. Indeed, in some circumstances, the Guidelines permit the base offense level itself to be determined on the basis of uncharged conduct. See, e.g., USSG § 2D1.1(a)(3) & Application Note 12; cf. *Witte* v. *United States*, 115 S. Ct. 2199, 2207 (1995) (finding no "bright line distinction" between the "criminal history" section and the "relevant conduct" section of the Guidelines). But the Guidelines at issue in this case expressly fix the defendant's base offense level on the basis of the offense of conviction, and the district court here must accordingly be understood to have imposed what was essentially a new offense of conviction for Guidelines purposes. This is particularly evident in this case, where the jury actually failed to convict Conley of the substantive money laundering counts, and where the jury's own question indicates that it believed Conley guilty of conspiracy to commit only one of the charged object offenses — presumably, operation of an illegal gambling business.[12]

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states that "if each object of the conspiracy had been an element of the crime then under well-established law the defendant in *Griffin* would have been entitled to an acquittal since the proofs could not support the charge that she conspired with respect to one object." App. A17. In any event the conclusion the Court of Appeals draws from this — that "it is clear from *Griffin* that making the object of a conspiracy . . . a matter for the sentencer rather than an element of the crime does not violate the Sixth Amendment," App. A17 — is a complete *non sequitur*.

[12] Although there are decisions of at least one court of appeals prohibiting sentencing under the Guidelines on the basis of charged conduct of which the defendant was not convicted, see, *e.g.*, *United States* v. *Brady*, 928 F. 2d 844, 851-852 (CA9 1991) (sentencing on the basis of conduct of which the jury acquitted the defendant is impermissible, even

Nor is it relevant that Congress might have given the district court complete discretion in sentencing within the statutory limit, since the enactment of the Guidelines in fact divests the district judge of such discretion, see *Mistretta*, 488 U. S. at 391 ("[T]he Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases."). Cf. *Cleveland Board of Educ.* v. *Loudermill*, 470 U. S. 532 (1985) (arguably "greater" power to avoid creating any property interest does not include arguably "lesser" power to create a property interest defined by the procedures provided for its deprivation). Since the Guidelines themselves make clear that the base offense is fixed on the basis of the offense of conviction, this case — in which sentencing discretion is limited by a Guideline promulgated pursuant to congressional authority — is indistinguishable from one in which the restriction on discretion in imposing punishment is promulgated by Congress itself through a *statutory* maximum sentence.

The district court, applying the procedure described in Application Note 5 to USSG § 1B1.2(d), sentenced Conley after determining his base offense level on the basis of a count of conviction for conspiracy to launder money, when it was concededly impossible to say — because of the court's own prior ruling denying Conley's request for a special verdict — whether the *jury* had in fact concluded that Conley was guilty of that offense. Consequently, the sentence imposed by the district court and affirmed by the Third Circuit should be reversed.

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if the court is called upon to find the conduct only under a preponderance standard), we do not rely on them here because, despite the clear implication of the jury's verdict and its question, even together they do not demonstrate with complete certainty its conclusion one way or another as to the charge of conspiracy to launder money.

CONCLUSION

The holding of the Third Circuit in this case permitted Conley to be punished for a crime — conspiracy to launder the proceeds of an unlawful gambling business in violation of 18 U. S. C. § 1956(a)(1)(A) — of which it cannot be said he has been convicted by the jury and of which, if convicted at all, he has been convicted only by the judge. Because he assuredly could not have been so sentenced by a court in the Eighth or Tenth Circuits,[13] this Court should grant certiorari and, because petitioner's sentence violates both the Fifth and Sixth Amendments, the judgment of the Court of Appeals should ultimately be reversed.[14]

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[13] Nor perhaps in the Second, Fourth, Fifth, Ninth or District of Columbia Circuits under *United States* v. *Garcia*, 37 F. 3d 1359, 1371 (CA9 1994); *United States* v. *Bounds*, 985 F. 2d 188, 194-195 (CA5), cert denied, 510 U. S. 845 (1993); *United States* v. *Orozco-Prada*, 732 F. 2d 1076, 1083-1084 (CA2), cert. denied 469 U. S. 845 and cert. denied 469 U. S. 845 (1984); *United States* v. *Quicksey*, 525 F. 2d 337 (CA4 1975), cert. denied, 423 U. S. 1087 (1976); and *Brown* v. *United States*, 299 F. 2d 438, 440 (CADC), cert. denied, 370 U. S. 946 (1962).

[14] Because Conley was entitled either to have a special verdict form submitted to the jury or to be sentenced only for conspiracy to commit the lesser object offense, operating an illegal gambling business, the proper disposition of this case after reversal might be to give the Government the option either of consenting to resentencing under the lesser Guideline range or of providing Conley with a new trial in which the jury will be given a special verdict form. Cf. *Orozco-Prada*, 732 F. 2d at 1084 (utilizing a similar procedure); *Quicksey*, 525 F. 2d at 341 (same); *Brown*, 299 F. 2d at 440 (same).

Respectfully submitted,

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November 25, 1996

APPENDIX A

Filed August 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3556

UNITED STATES OF AMERICA

v.

JOHN F. "Duffy" CONLEY; WILLIAM C. CURTIN; SHEILA F. SMITH; JOHN FRANCIS "Jack" CONLEY; THOMAS "Bud" MCGRATH; MARK A. ABBOTT; THOMAS ROSSI; WILLIAM STEINHART; ROBERTA FLEAGLE; ROBIN SPRATT; MONICA C. KAIL; WILLIAM J. REED; JOANNE T. SMITH; KENNETH "Ron" GOODWIN; LAWRENCE N. "Neudy" DEMINO, SR.; CHRISTOPHER "Chris" KAIL; JOSEPH A. DEVITA; FRANK GAROFALO; THOMAS D. CIOCCO; MICHAEL SUKALY; PHILLIP M. "Mike" FERRELL; ANESTOS "Naz" RODITES; WILLIAM E. RUSIN

JOHN F. "Duffy" CONLEY,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim No. 91-00178-1)

Argued May 6, 1996

BEFORE: GREENBERG, ALITO, and MCKEE,
Circuit Judges

(Filed: August 1, 1996)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *Factual Background*

John F. Conley appeals from a judgment of conviction and sentence entered in this criminal case involving gambling and money laundering on September 29, 1995. This case requires us to determine the constitutionality of section 1B1.2(d) of the United States Sentencing Guidelines. That provision, with its accompanying application note, note 5, requires the sentencing court to determine beyond a reasonable doubt the objects of a multi-object conspiracy after a jury returns a general guilty verdict on the conspiracy charge which does not specify the objectives of the conspiracy. Conley argues that permitting the court to determine the objectives of the conspiracy violates his Sixth Amendment right to jury trial and the

Due Process Clause of the Fifth Amendment. In addition, he raises two claims not related to sentencing matters. Because we find section 1B1.2(d) constitutional and reject his other claims, we will affirm.

We set forth the facts in the light most favorable to the government as the verdict winner, though we observe that the relevant facts are not contested seriously. *United States v. Pungitore*, 910 F.2d 1084, 1097 (3rd Cir. 1990), *cert. denied*, 500 U.S. 915, 111 S.Ct. 2009 (1991). Conley owned and operated the largest video poker machine gambling business in the Pittsburgh, Pennsylvania, area.[1] At the height of his business, Conley owned thousands of video poker machines in hundreds of businesses throughout western Pennsylvania.[2] During the period covered by the indictment Conley made millions of dollars from this business.

Conley operated his gambling business by purchasing video poker machines equipped for gambling and placing them in business establishments with the understanding that they would be used for gambling. The machines had knock-off devices to eliminate points after a payoff and internal accounting mechanisms to allow Conley and the business owners to calculate their profits. Conley

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1. A video poker machine is an electronic device with a video screen at the top and buttons to operate its functions. The object of playing a video poker machine is to obtain the best poker hand possible on the video screen. The machine awards points for winning poker hands. A video poker machine is used as a gambling device when a player receives a cash payoff for the points won. In this case employees of the establishments where the video poker machines were located made the payoffs. After making the payoff, the employee eliminated the points from the machine through the use of a "knock-off" device built into the machine. A separate accounting or bookkeeping mechanism in the machine keeps track of the money put into the machine and the points knocked off the machine. A video poker machine equipped with knock-off and bookkeeping functions facilitates the use of the machine for gambling because it enables the owner of the machine to determine how much money was put into the machine and how much money was paid out to players.

2. Some video poker machines were placed in facilities that could not be regarded strictly as businesses.

persuaded business owners to install his video poker machines by offering to split the gambling proceeds with the owners, supplying start-up money, and promising to provide an attorney and to pay any fines if the owners got into trouble with law enforcement authorities for operating the machines as gambling devices. Conley candidly testified at the trial that his business was a gambling business and all of his video poker machines were used for gambling. His defense was that he operated openly and even obtained municipal licenses for some of the machines. In essence, he regarded his activities as legal.

As the gambling business grew, Conley hired employees to solicit new locations, to move and service his video poker machines, and to collect his share of the proceeds from his hundreds of locations. Some of the 22 persons indicted with him were his employees and others were owners or employees of businesses where his video poker machines were used as gambling devices. To facilitate his operations, Conley opened accounts at the Pittsburgh National Bank for the deposits of his gambling proceeds. The scope of Conley's operation is demonstrated by the fact that between 1985 and 1990 he or his employees deposited over $10,000,000 in the accounts, about 93-94% of which was from video poker machine gambling. Conley used the money in these two accounts to promote his gambling business.

In addition to soliciting business establishments to become part of his gambling operation, Conley purchased buildings and businesses for use of video poker machines. He either paid salaries or wages to his employees at these locations or compensated them on a percentage basis. Conley collected large sums from his most profitable locations, the most notable one being a snack shop in McKees Rocks, Pennsylvania, called Terry's Snack Shop.

Not surprisingly Conley's wide-open gambling business came to the attention of law enforcement authorities. In 1987, the Pittsburgh police arrested Conley for his part in video poker machine gambling at a particular location. Conley was tried in March 1988 in the Court of Common Pleas of Allegheny County on charges arising from this operation and was found guilty of violating the

Pennsylvania anti-gambling law, 18 Pa. Con. Stat. Ann. § 5513 (1983). The court sentenced Conley to pay a $1,000 fine and to serve two years on probation.

Conley obviously regarded the fine as nothing more than a trivial cost of doing business because he continued his operations. As a result, local, state and federal law enforcement officials began investigating him. These investigations led to searches of his offices and the seizure of hundreds of his video poker machines between 1988 and 1991. A search on September 23, 1988, led to a state grand jury indicting Conley on gambling charges for operating his video poker machine gambling business but the indictment eventually was dismissed.

The law enforcement pressure caused Conley and his co-defendants to take measures to thwart the investigatory efforts. Informants would warn Conley of impending law enforcement raids and Conley or one of his employees in turn would warn affected locations so that video poker machines could be removed. Conley instructed others to remove the money contained in his video poker machines, and, on one occasion, all the information in Conley's computer about his video poker machines was "dumped" onto a computer disk which then was hidden in an employee's car.

Furthermore, as a result of increasing law enforcement scrutiny, Conley made changes in how he conducted his business. Thus, Conley instructed his employees on a new method to take the readings off video poker machines designed to prevent law enforcement authorities from accessing this information. After law enforcement authorities started their searches, Conley's collectors no longer took the gambling proceeds to Conley's offices but, instead, at Conley's instructions, took the money to other locations or directly to the bank for deposit. Furthermore, Conley's location owners and operators instituted a policy not to make payoffs to persons they did not know. In one instance Conley counseled an employee to be "careful not to pay a cop or a stranger." Conley, who obviously was not lacking in nerve, on one occasion secretly entered a premises in which United States marshals had secured

seized video poker machines and removed the knock-off devices from them.

The law enforcement pressure caused Conley to reorganize his gambling business to make his involvement less apparent. Following a large number of federal searches, Conley transferred ownership of his video poker machines to three companies he had created. Conley installed an employee as a front owner in each of these companies but he retained effective control over them, and their employees and assets. At the same time, Conley created a company to service the video poker machines transferred to the three newly formed companies. Conley then instructed the nominal owners of the three new vending companies to make monthly payments to the service company from their gambling proceeds. Conley determined the amounts of these payments without regard to the level of services rendered. At the time he created the three new companies, Conley transferred the title to his best gambling location, Terry's Snack Shop, to the woman who ran it for him.

B. *Procedural History*

The foregoing activities led to a federal grand jury in the Western District of Pennsylvania returning on September 26, 1991, a 29-count indictment charging 23 individuals with participation in an illegal gambling operation involving video poker machines. The indictment identified Conley as the central figure in an extensive illegal video poker machine gambling business and covered the period from 1984 through September 26, 1991.

Count one charged Conley and his 22 co-defendants with conspiracy to conduct an illegal gambling business and to launder the proceeds therefrom in violation of 18 U.S.C. § 371. Count two charged Conley and his 22 co-defendants with conducting an illegal gambling business in violation of 18 U.S.C. §§ 1955 and 2. One "part and object" of the conspiracy was that Conley and his co-conspirators conducted an illegal gambling business involving video poker machines "in violation of the laws of the Commonwealth of Pennsylvania" which, in turn, was in violation of 18 U.S.C. § 1955. Count one also charged that

a "further" "part and object" of the conspiracy was to engage in money laundering to promote the illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A).

The conspiracy count charged that "an essential part of the illegal gambling business" involved the division of gambling proceeds with a person at the video poker machine locations, the delivery of Conley's share of the gambling proceeds to certain of his employees, and the deposit of the proceeds into bank accounts Conley controlled. Count one also charged that Conley engaged in money laundering activities with the intent to promote his illegal gambling business and that Conley used illegal gambling proceeds to promote his illegal gambling business by purchasing more video poker machines, paying his employees, and depositing the proceeds in the bank. In addition, the overt acts of the conspiracy to launder money included numerous payments to Conley's video poker machine service company. The remaining 27 counts of the indictment charged certain of the defendants with interstate travel to carry on an unlawful activity in violation of 18 U.S.C. § 1952(a)(3), interstate transportation of gambling devices in violation of 15 U.S.C. §§ 1172 and 1176, and money laundering in violation of 18 U.S.C. § 1956.

The proceedings after the indictment was returned were complex. Over the next three years, the district court issued numerous published opinions on scores of motions and we have issued two published opinions in this case. *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994); *United States v. Conley*, 4 F.3d 1200 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 1218 (1994).[3] Two of the district court's opinions are particularly significant. In *United States v. Conley*, 859 F. Supp. 909 (W.D. Pa. 1994), the district court rejected Conley's motions to dismiss the indictment on the grounds that video poker is de facto legal, he was prosecuted selectively, and the government engaged in misleading conduct ("entrapment by estoppel") thereby violating his due process rights. However, in another order the court

3. Following the trial we issued an unreported opinion involving a co-defendant which we discuss below. *United States v. Smith*, No. 95-3391 (3d Cir. Oct. 24, 1995).

dismissed certain money laundering counts on the ground that they were duplicitous. *United States v. Conley*, 826 F. Supp. 1536 (W.D. Pa. 1993).

Following that dismissal, on August 4, 1994, a grand jury in the Western District of Pennsylvania returned a 15-count indictment charging Conley with money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A) and 2. These new counts reasserted the charges in the dismissed money laundering counts. On November 22, 1994, the district court consolidated the two indictments for trial. Conley was the only defendant to be tried because the others all pleaded guilty to a violation of 18 U.S.C. § 371 or 18 U.S.C. § 1955. Conley's first trial ended in a mistrial. His second trial began on April 25, 1995, and concluded on June 23, 1995, with the jury finding him guilty on counts one and two of the original indictment charging him with conspiracy in violation of 18 U.S.C. § 371 and with conducting an illegal gambling business in violation of 18 U.S.C. §§ 1955 and 2. The jury was unable to reach a verdict on the 15 money laundering counts in the second indictment and the court declared a mistrial as to them.

On July 14, 1995, the district court made tentative findings of fact for sentencing purposes pursuant to U.S.S.G. § 1B1.2(d). Employing a "beyond a reasonable doubt standard," as required by application note 5 to section 1.B1.2(d), the court found that Conley and his co-conspirators "adhered to and/or conspired to commit both of the objects alleged in Count one" of the original indictment, that is, "they conspired to conduct an illegal gambling business and to launder the proceeds thereof."[4] The court reached the second conclusion notwithstanding the jury's inability to return a verdict on the money

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4. The application note indicates that "subsection d should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiracy to commit that object offense." While this application note in itself probably would mandate the reasonable doubt standard, any question regarding that point is eliminated by the commentary to amendment 75 of the guideline which explained when section 1B1.2(d) and application note 5 were adopted that "this decision should be governed by a reasonable doubt standard."

laundering charges contained in the second indictment. Then on September 28, 1995, the district court made supplemental tentative findings and rulings.

Ultimately the court determined Conley's sentence as follows. The court started with the sentencing guideline for violation of 18 U.S.C. § 371 found at U.S.S.G. § 2X1.1, which provides that the base offense level is determined by the substantive offense which is the object of the conspiracy. Since the court already had applied U.S.S.G. § 1B1.2(d) and found that Conley conspired to operate an illegal gambling business and to launder its proceeds, the court grouped the two offenses pursuant to U.S.S.G. § 3D1.2(b). Under U.S.S.G. § 3D1.3(a), in the case of grouped counts, the offense level is determined by the most serious of the counts comprising the group. Since the base offense level for money laundering under U.S.S.G. § 2S1.1 is greater than that for conducting an illegal gambling business under U.S.S.G. § 2E3.1, the court used the base offense level of 23 contained in U.S.S.G. § 2S1.1. The court found that Conley had conspired to launder in excess of $10,000,000. Accordingly, the district court increased the base offense level under U.S.S.G. § 2S1.1(b)(2) by 9 levels to 32. The court found that Conley was the leader of the conspiracy and, as a result, the court increased the offense level by 4 levels under U.S.S.G. § 3B1.1(a) to 36.

The court also found that Conley's "conduct in testifying falsely at pretrial hearings, directing others to destroy or conceal evidence, opening video poker machines after they had been seized by the U.S. Marshals and throwing papers into his fireplace when federal agents were at his door is sufficient evidence of obstruction to warrant an enhancement in the base offense level." As a result, the court increased the offense level another 2 levels under U.S.S.G. § 3C1.1 to 38. With a total offense level of 38 and a criminal history category I, Conley's sentencing range was 235 to 293 months.

On September 29, 1995, the court sentenced Conley to 60 months imprisonment on count one and 60 months imprisonment on count two, the maximum sentences allowed by 18 U.S.C. §§ 371 and 1955. Since the maximum sentences permitted under the statutes were not equal to

the guideline range, the court directed that Conley serve the sentences consecutively pursuant to U.S.S.G. § 5G1.2(d). The court also imposed a $1,000,000 fine. Conley then appealed.

The district court denied Conley bail pending appeal based on its finding "by clear and convincing evidence that [Conley], contrary to the conditions of his bail, continued to engage in illegal gambling in the operation of his business involving video poker machines subsequent to the indictment period and subsequent to his conviction on Counts 1 and 2 of the indictment at Criminal No. 91-178." In addition, the district court found that Conley grossed at least $4,320,000 after his indictment through the continuation of his illegal conduct and that Conley committed perjury by filing false affidavits representing that he was not involved in any gambling activity.

II. DISCUSSION

Conley claims that his sentence violates the Fifth and Sixth Amendments, that the district court improperly limited his scope of cross-examination of government witnesses, and that it improperly admitted evidence seized in violation of the Fourth Amendment. While ordinarily we would address the evidence and search and seizure issues before the sentencing issues, we will invert that order as Conley addressed the sentencing issues first in his brief and they require more discussion than the other issues.

A. *Constitutionality of the Sentence*

Conley argues that his sentence violates the Due Process Clause of the Fifth Amendment and his Sixth Amendment right to a jury trial. The jury convicted him of a single count of conspiracy under 18 U.S.C. § 371 that as charged included as objects (1) violation of the gambling laws and (2) money laundering. Conley argues that since the jury did not specify the object of the conspiracy for which it convicted him it is unconstitutional to sentence him under the money laundering guidelines because they are more severe than the gambling guidelines, especially since he

was not convicted of the underlying substantive money laundering counts.

It is clear that when a jury returns a general verdict of guilty on a multi-object conspiracy count, the conviction will stand over Fifth Amendment due process objections so long as there is sufficient evidence to support any one of the objects of the conspiracy. Thus, the Supreme Court has said: " '[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as [defendant]'s indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.' " *Griffin v. United States*, 502 U.S. 46, 56-57, 112 S.Ct. 466, 473 (1991) (quoting *Turner v. United States*, 396 U.S. 398, 420, 90 S.Ct. 642, 654 (1970)).[5] Nevertheless if any of the *legal* theories submitted to the jury was unconstitutional a general verdict of guilty cannot stand. *Bachellar v. Maryland*, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16 (1970); *see also Griffin*, 502 U.S. at 55, 112 S.Ct. at 472 (listing numerous cases for this proposition).

Most courts also have held that the punishment imposed after a general jury verdict of guilty in a multi-object conspiracy cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects if the punishment authorized by the conspiracy statute depends on the punishment provided for the substantive offense or offenses which were the object or objects of the conspiracy. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 154 (1984); *United States v. Quicksey*, 525 F.2d 337, 340-41 (4th Cir. 1975) (Defendants were charged and convicted in single count in a narcotics case under both the narcotics conspiracy statute, 21 U.S.C. §846, and the general conspiracy statute, 18 U.S.C. §371. The court held that "in the absence of a special verdict, it is not possible to

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5. *Griffin* overruled *United States v. Tarnopol* 561 F.2d 466, 474 (3d Cir. 1977), where we held that, "[T]he verdict of guilty . . . cannot stand if the indictment was insufficient in law in that any one of the three objectives of the conspiracy did not constitute a crime or if the evidence was insufficient to sustain a finding by the jury that any one of these activities had been engaged in."

ascertain whether the jury intended to find the defendants guilty of conspiracy to violate the Travel Act or the Drug Act, or both Acts," and therefore the government must agree to resentencing under the shorter general conspiracy provision or court would remand for new trial.), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 878 (1976); *United States v. Fisher*, 22 F.3d 574, 576 (5th Cir.) ("[W]e recognize[ ] that punishment for conviction of a multiple object conspiracy may not exceed the statutory maximum for the offense carrying the least severe penalty."), *cert. denied*, 115 S.Ct. 529 (1994); *United States v. Garcia*, 37 F.3d 1359, 1370 (9th Cir. 1994) ("The sentencing court cannot speculate as to which object of the conspiracy the jury found to support the conviction. To do so would invade the province of the jury."; rejecting government's argument that jury's finding of guilty on the underlying offense permits inference that jury convicted defendant on basis of more serious object), *cert. denied*, 115 S.Ct. 1699 (1995); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990) (verdict unclear as to whether methamphetamine or amphetamine was object of drug conspiracy could not support higher sentence based on methamphetamine); *Newman v. United States*, 817 F.2d 635, 637-39 (10th Cir. 1987); *Brown v. United States*, 299 F.2d 438 (D.C. Cir.), *cert. denied*, 370 U.S. 946, 82 S.Ct. 1593 (1962).[6]

In two cases, however, courts of appeals have upheld sentences exceeding the statutory maximum for the least severely punished substantive offense charged as an object of the conspiracy in a multi-object conspiracy case. In *United States v. Peters*, 617 F.2d 503 (7th Cir. 1980) (per curiam), the court held a multi-object conspiracy conviction without a special verdict could support a 15-year sentence even though the sentence was longer than several of the sentences statutorily provided for the predicate offenses. But in *Peters* the jury also convicted the defendant of substantive drug offenses carrying 15-year sentences.[7] In

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6. The issue presented in these cases is not before us, but we assume for the sake of argument that it was correctly decided.

7. Our harmless error analysis upholding a jury verdict in *United States v. Edmonds*, 80 F.3d 810, 823-27 (3d Cir. 1996) (in banc), was predicated on reasoning similar to that in *Peters*.

United States v. Dennis, 786 F.2d 1029 (11th Cir.), *modified on other grounds on rehearing*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973 (1987), the court affirmed a conspiracy sentence that exceeded the statutory maximum for conviction of one of the underlying statutes, but only because there was no question as to the basis of the jury's finding. Ordinarily, it said, a special verdict would be necessary because:

> [Absent a special verdict], the reviewing court . . . may not examine the evidence presented at trial to determine whether the jury, if properly instructed, *could* have or even *should* have found [the more severe basis for the conspiracy]; rather the court's inquiry is confined to determining beyond any reasonable doubt whether the jury *did* find such a conspiracy and whether it intended the verdict it returned to reflect that determination. Only in that manner may we avoid invading the special province of the jury in a criminal case both to find the facts and apply the law as it sees fit. Thus the prosecution's interest in obtaining a jury verdict that will be construed to reflect a finding [that the defendant's object in the conspiracy was the more severely punished object] can only be frustrated where the government opposes a defense request for a special verdict in a case involving a conspiracy charge similar to the one at issue here.

Id. at 1041.

Here, the district court's finding that Conley had conspired to commit both objects specified in the conspiracy charged in count one resulted in a base offense level of 32. This finding was significant because if the district court found that Conley conspired only to engage in an illegal gambling business, the base offense level would have been 12. The court, however, sentenced Conley under 18 U.S.C. § 371, the general conspiracy statute, which provides, with an inapplicable misdemeanor exception, a maximum sentence of five years, regardless of the maximum sentence authorized for violation of the law which the defendant conspired to violate.

Since the maximum sentence for conspiracy in this case does not depend upon the penalties authorized for the

underlying substantive offenses, Conley's *statutory* maximum sentence on this count, as distinguished from the maximum sentence under the *guidelines*, does not depend upon whether the jury found him guilty of either or both objects of the conspiracy. The sentence, therefore, does not run afoul of the proposition that the district court must sentence in accordance with the least severe predicate offense statute when the jury returns a general verdict of guilty in a multi-object conspiracy. Thus, the line of cases cited above — multi-object conspiracy cases with defendants sentenced pursuant to penalty provisions dependent on substantive law — is distinguishable.

Conley argues, however, that the rule requiring use of the penalties for the least onerous predicate offense in sentencing after general guilty verdicts in multi-object conspiracy cases should apply to calculations under the sentencing guidelines. There is support for this position. The Court of Appeals for the Tenth Circuit in *United States v. Pace*, 981 F.2d 1123, 1128-30 (10th Cir. 1992), *cert. denied*, 507 U.S. 966, 113 S.Ct. 1401 (1993), held that if a jury returns a general verdict which does not specify the object of a conspiracy, the defendant must be sentenced under the sentencing guidelines on the basis of the objective yielding the lowest offense level. *See also United States v. Bush*, 70 F.3d 557, 561 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 795 (1996). Similarly, the Court of Appeals for the Eighth Circuit, in another guidelines case, has held that a district court must calculate the sentence on the basis of the least severely punished object after a general verdict of guilty in a multi-object conspiracy case. *United States v. Owens*, 904 F.2d 411 (8th Cir. 1990). The court explained:

> Because the establishment of Owen's base offense level required a determination of which drug the conspiracy involved, and because the Sentencing Guidelines provide disparate sentencing ranges for amphetamine and methamphetamine, the district court should have used a special verdict form to permit the jury to indicate which substance it found to be the object of the conspiracy.
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> . . .

> [B]y failing to enable the jury to indicate which of the substances it found the conspiracy to have involved, the district court elicited an ambiguous verdict of guilty with two possible alternative interpretations. Under the circumstances of this case, the district court erred in sentencing Owens based on the alternative which yielded a higher sentencing range.

Id. at 415. Drawing on these cases, Conley claims that sentencing him under section 1B1.2(d) on the basis of a verdict which does not designate the object of the conspiracy for which the jury convicted him violates his Sixth Amendment right to a jury trial.

We start our analysis of this Sixth Amendment argument with *McMillan v. Pennsylvania*, 106 S.Ct. 2411 (1986). There the Supreme Court permitted a state to treat conduct which arguably was an element of a criminal offense, the visible possession of a weapon during certain offenses, as a sentencing factor. As a result, the trial court rather than the jury would determine whether the sentencing factor was present and would do so by the preponderance of the evidence. The Court in reaching its result explained:

> While 'there are obviously constitutional limits beyond which the States may not go in this regard,' *ibid.*, '[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.'

Id. at 2415 (quoting *Patterson v. New York*, 432 U.S. 197, 211 n.12, 97 S.Ct. 2319, 2327 n.12 (1977)). The Court analyzed the Sixth Amendment claim tersely:

> Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.

Id. at 2420 (citing *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161 (1984)).

It is clear from *McMillan*, that if section 1B1.2(d) is, in the words of *McMillan*, properly a "sentencing consideration,"

then the section does not infringe the Sixth Amendment right to jury trial. The Chief Justice's concurring opinion in *United States v. Gaudin*, 115 S.Ct. 2310, 2321 (1995), is in harmony with *McMillan*. There the Chief Justice noted that:

> Nothing in the Court's decision stands as a barrier to legislatures that wish to define — or that have defined — the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration. We have noted that the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes which are solely creatures of statute.

Id. (Rehnquist, C.J., concurring) (internal quotation marks omitted). We must decide, therefore, whether the determination of the object of a multi-object conspiracy following a general verdict of guilty properly can be deemed the ascertaining of a sentencing consideration or whether such a determination is beyond the "constitutional limits" referred to in *McMillan*, 477 U.S. at 85, 106 S.Ct. at 2415, and *United States v. Patterson*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327 (1977).

This issue is controlled by the Court's holding in *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, where the Court rejected the due process argument that a general verdict of guilty in a multi-object conspiracy verdict could not stand if the evidence to support a conviction for conspiracy to commit one of the objects was insufficient. The Court reached that result notwithstanding its almost contemporaneous holding in *Sullivan v. Louisiana* that the prosecution "must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of [the] elements" of the crime. 508 U.S. 275, 278, 113 S.Ct. 2078, 2080 (1993). As the Court explained in *Sullivan*, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.* at 278, 113 S.Ct. at 2081.

If, as Conley asserts, it were constitutionally impermissible to treat the object of a multi-object conspiracy indictment as a sentencing factor rather than as an element of the crime, then it is difficult to understand

how the *Griffin* Court, consistently with *Sullivan*, could have permitted a conspiracy conviction to stand when there was insufficient evidence to support a conviction for one of the objects. After all, if each object of the conspiracy had been an element of the crime then under well-established law the defendant in *Griffin* would have been entitled to an acquittal since the proofs could not support the charge that she conspired with respect to one object. Thus, while Conley argues that violation of each object of the conspiracy must be considered a separate element of the offense for the purposes of his Sixth Amendment right to a jury trial, it is clear from *Griffin* that making the object of a conspiracy charged under 18 U.S.C. § 371 a matter for the sentencer rather than an element of the crime does not violate the Sixth Amendment.[8]

Our result finds support in *United States v. Martinez*, 924 F.2d 209 (11th Cir.), *cert. denied*, 502 U.S. 870, 112 S.Ct. 203 (1991), in which the Court of Appeals for the Eleventh Circuit described the distinction between the constitutional uses of the guidelines and the statutes:

> [Equating the constitutional limitations on their use] misperceives the distinction between a sentence and a sentence enhancement. Although both the separate sentence under § 924(c) and the sentence enhancement under Guidelines § 2D1.1(b)(1) result in an increased penalty, only a conviction and sentence under § 924(c) requires the full panapoly of constitutional safeguards ordinarily granted criminal defendants.
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> Because the Guidelines did not alter the maximum sentence for the offense for which appellant was convicted but merely limited the sentencing court's discretion in selecting a penalty within the permissible range, there is no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor

8. We emphasize that this rationale does not apply to determining the limits of a sentence under a conspiracy statute that incorporates penalty provisions from substantive laws.

> convicted, so long as proof of that conduct is supported by reasonable indicia of reliability.

Id. at 211 (internal quotations and citations omitted).

We also note that decisions of other courts of appeals are consistent with our conclusions. *See United States v. Dale*, 991 F.2d 819, 854-55 (D.C. Cir. 1992) (affirming guidelines calculation after general guilty verdict on multi-count conspiracy indictment after jury conviction on underlying substantive offense), *cert. denied*, 114 S.Ct. 286 (1993); *United States v. Linn*, 31 F.3d 987, 995 (10th Cir. 1994) (affirming guideline calculation based on general guilty verdict on multi-count conspiracy indictment when jury instructions phrased in *conjunctive* rather than *disjunctive*); *United States v. Wessels*, 12 F.3d 746, 754 (8th Cir. 1993) (where type of methamphetamine involved in crime would affect guideline sentence, and jury verdict ambiguous on this point, remanding to *district court* for determination of type of methamphetamine involved; no new *jury* trial required), *cert. denied*, 115 S.Ct. 105 (1994). Consequently, we reiterate that permitting the court to determine for sentencing guideline purposes the objects of a conspiracy charged in an indictment under 18 U.S.C. § 371 if the jury finds the defendant guilty in a general verdict does not violate the Sixth Amendment and therefore section 1B1.2(d) itself does not violate that amendment.

Finally on the Sixth Amendment issue we point out that our result is in harmony with our jurisprudence under the sentencing guidelines from the time of our earliest guidelines opinions. *See United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989). In *Ryan* the defendant was charged with possession of a controlled substance, crack, with intent to distribute. The jury acquitted him on that charge but convicted him of the lesser included offense of simple possession of a controlled substance. At sentencing the district court departed upwards from the applicable guideline range on the basis of factors which indicated that the defendant possessed the crack with the intent to distribute. Ryan appealed, contending that "in effect, he was sentenced for a crime for which he had been acquitted." *Id.* at 606. We rejected his contention, pointing out that the guidelines allowed the sentencing court to take

into consideration conduct that neither was formally charged nor was an element of the offense of conviction, *id.* at 608 n.9, and that "[b]efore the guidelines were promulgated, a court was permitted to consider evidence on counts of which a defendant was acquitted in sentencing the defendants." *Id.* at 609. We have adhered to the *Ryan* approach and we note that many other courts have reached the same result as *Ryan*. *See, e.g., United States v. Fierson*, 945 F.2d 650, 653-54 (3d Cir. 1991), *cert. denied*, 503 U.S. 952, 112 S.Ct. 1515 (1992); *United States v. Foster*, 19 F.3d 1452, 1454-55 (D.C. Cir. 1994); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 180-81 (2d Cir.), *cert. denied*, 498 U.S. 844, 111 S.Ct. 127 (1990).

Ryan, of course, differs from this case as it dealt with a departure whereas here we are concerned with the establishment of the guideline range. But still *Ryan* is persuasive here for in this case, as in *Ryan*, the district court made a determination predicated on its conclusions as to the conduct in which the defendant engaged at the time of the offense, even though the verdict did not support the conclusion. Indeed, in two respects Conley's argument is weaker than that of the defendant in *Ryan* because in *Ryan* the jury acquitted the defendant of the distribution offense. In this case, for all we know, the jury might have concluded that Conley was guilty on the conspiracy money laundering charge or may have not reached a conclusion on the point. Furthermore, here, unlike in *Ryan*, the court made the determination that the defendant engaged in the conduct on which the sentence depended beyond a reasonable doubt.[9] *Ryan* is further significant on an additional argument that Conley advances, *i.e.*, that the court should have submitted a special verdict form to the jury to determine the object of the conspiracy if the jury convicted him on the conspiracy count. The court did not

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9. Judge McKee believes that the analysis in *United States v. Bush*, 70 F.3d 557, 561-62 (10th Cir. 1995), and *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), is correct and would reverse the decision of the district court on that basis. However, he feels compelled to join the other members of the panel in affirming the decision of the district court because of *United States v. Ryan*, 866 F.2d 604, 608-09 (3d Cir. 1989). *See* Third Circuit I.O.P. 9.1.

err in refusing to submit the special verdict form. Under *Griffin* the special verdict form was not required for the jury to return a valid guilty verdict nor was it necessary for the district court or this court to review the sufficiency of the evidence to support the verdict. *Ryan* makes clear that even after a not guilty verdict the district court may consider the conduct of which the defendant was acquitted in imposing sentence. While if the court submits to the jury the task of determining the object of the conspiracy, it may be bound by section 1B1.2 by the jury's conclusion, still we see no reason why the court cannot decline in a conspiracy case under 18 U.S.C. § 371 to use a special verdict form and instead reserve the determinations germane to sentencing to itself.

As we have indicated, Conley also argues that his sentence violates the Due Process Clause of the Fifth Amendment because of the district court's power to make the crucial finding that an object of the conspiracy was money laundering. Here we are guided by the Court's holding in *McMillan*. There the Court considered a Pennsylvania statute which subjected defendants convicted of certain felonies to a mandatory minimum sentence of five years imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. The Court found that the preponderance of the evidence standard was constitutional but explained that "in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *McMillan*, 477 U.S. at 86, 106 S.Ct. at 2416 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970)). The Court refused to draw a bright line but observed that the Pennsylvania statute "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88, 106 S.Ct. 2417.

We also are informed on the due process issue by *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990). There we found that a determination during sentencing that increased the defendant's sentence from about 30 months to 30 years, the equivalent of a 22-level increase in his

offense level, constituted a "tail which wags the dog of the substantive offense." *Id.* at 1100-01. Consequently, we required that facts found at such an important sentencing hearing be established by "clear and convincing evidence" rather than simply by a preponderance of the evidence. *Id.* at 1103.

In this case, Conley's sentence exposure was increased from a base offense level of 12 to 32 as a result of the finding by the district court that money laundering was an object of the conspiracy. Since the court made this finding under the "beyond a reasonable doubt" standard, we have no need to determine whether we could uphold the 20-level increase on the basis of a finding meeting a less exacting standard. By determining the objects of the conspiracy beyond a reasonable doubt, the sentencing court met whatever procedural standard which might have been required.[10] Thus, section 1B1.2(d), which with application note 5 requires the use of the beyond a reasonable doubt standard, does not violate the Fifth Amendment.

In his reply brief, Conley relies heavily on *United States v. Schramm*, 75 F.3d 156 (3d Cir. 1996), to support his due process contentions. In *Schramm* the appellant was convicted for a conspiracy violation under 18 U.S.C. § 371

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10. In *United States v. Kikumura* we suggested, as an alternative to increasing certain specific procedural standards at sentencing, an approach limiting the

> concededly broad power of legislatures to define, and courts to consider, conduct that is or could be criminalized as an aggravating factor at sentencing. In effect, this approach would require that, for sentencing purposes, certain findings in certain circumstances be made pursuant to the *entire* panapoly of procedural protections that apply at trial.

Id. at 1101. This approach, in effect, would limit Congress's ability to define certain circumstances as sentencing factors rather than elements of the crime. For the reasons explained above, we do not adopt this approach in this case, but note that nothing in our holding should be read to preclude the application of this approach in another case; indeed *McMillan* specifically states that the legislature's ability to reallocate or reduce burdens of proof in criminal cases is limited by the Constitution. *Id.* at 86, 106 S.Ct. at 2416.

and the jury determined the object of the conspiracy on a special verdict form. The evidence presented, however, did not support a conviction for a conspiracy to commit that particular object. The district court upheld the verdict by a broad interpretation of the object as charged in the indictment so that the proofs were adequate. We reversed on the ground that the court's interpretation of the object was not consistent with the indictment. In the course of our opinion we pointed out that "the illegal object of the conspiracy is an essential element of the offense and must be included in the indictment," and "[t]he goal or goals of the agreement are, therefore, essential elements of the crime of conspiracy itself." *Id.* at 163.

Schramm is entirely consistent with our result. Here we are not concerned with a situation in which an indictment alleged one offense and the government proved the defendant committed another offense. The evidence against Conley clearly was sufficient to support the verdict of guilty on the conspiracy charge; Conley does not even argue that we should enter a judgment of not guilty.

Conley also claims that the district court erred in finding that he conspired to launder money. We will not set aside fact-finding by the district court unless it is clearly erroneous. *United States v. Katora*, 981 F.2d 1398, 1401 (3d Cir. 1992). We do not find that the district court's determination beyond a reasonable doubt that Conley was guilty of conspiracy to launder money was clearly erroneous. Indeed, it is difficult to understand how the proofs could not be deemed to support money laundering as that term is expansively defined in 18 U.S.C. § 1956(a)(1)(A).[11] We emphasize that the district court's

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11. Section 1956 provides in part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the procees of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> [is guilty of an offense].

determination of the object of the conspiracy is wholly independent of the jury's determination of the object of the conspiracy.

B. *Limitations of Cross-Examination*

Conley also claims that the district court erred in limiting the cross-examination of government witnesses regarding information necessary to his claim that he lacked the knowledge sufficient to find him guilty of the money laundering statute. Rule 611(b) of the Federal Rules of Evidence provides:

> Scope of Cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Id. "This court has given district courts wide discretion in limiting cross-examination." *United States v. Casoni*, 950 F.2d 893, 918 (3d Cir. 1991). "A restriction will not constitute reversible error unless it is so severe as to constitute a denial of the defendant's right to confront witnesses against him and it is prejudicial to substantial rights of the defendant." *Id.* at 917-18 (quoting *United States v. Adams*, 759 F.2d 1099, 1110 (3d Cir.), *cert. denied*, 474 U.S. 906, 106 S.Ct. 275 (1985)). The Supreme Court has explained that the Confrontation Clause requires only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986) (internal quotation marks omitted).

In particular, Conley objects to the district court's limitation on his cross-examination of government witnesses about the nature and scope of the vending machine business, permits issued by local municipalities for the machines, and the existence of other vendors operating in a similar fashion. In its memorandum opinion of April 17, 1995, the district court granted the

government's motion to limit cross-examination. It explained:

> In a previous memorandum opinion in this case, *United States v. Conley*, 859 F.Supp. 909 (W.D. Pa. 1994), this Court squarely rejected the 'affirmative defenses' of reliance on misleading government conduct (or entrapment by estoppel), selective prosecution and de facto legality, holding that, whatever merit these defense may have in the abstract or the right circumstances, the Conley defendants had proffered nothing to warrant presentation of these defenses to the jury.
>
> . . .
>
> [D]efendant will be entitled to present evidence as to the intent and knowledge elements of the crimes charged to the extent his proffered evidence is relevant to his state of mind at the time of the offenses. Defendant will be permitted to elicit such evidence only during *his* defense, but *not* during cross examination of the government witnesses, unless he first makes a convincing proffer outside of the presence of the jury and obtains the Court's permission to go beyond the scope of the subject matter of the direct examination of any given witness.

The district court's limitation of Conley's cross-examination to the matters raised on direct pursuant to Rule 611(b) was entirely justified and certainly does not rise to an abuse of the district court's discretion.

C. *Fourth Amendment Claim*

Finally, Conley argues that the district court erred in admitting evidence that he claims was obtained in violation of the Fourth Amendment when state police officers failed to knock and announce their presence and authority in executing a search warrant of 930 Saw Mill Run Boulevard in Pittsburgh. He contends that the Supreme Court's recent opinion, *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), lends support to his position.

We set out the facts at length as found by the district court on the point. The district court found that 930 Saw Mill Run Boulevard was a two-story, brown-brick building located in a strip of commercial properties. The words "Conley Motor Freight" were painted on the outside of the building. The building had two entrances, one facing the street and another in the rear of the building. Persons seeking to enter were directed by a sign to the back entrance. Inside the back doors was a storage room, and beyond the storage room a doorway leading to the first-floor office space. Another defendant in this case, Jack Conley, Conley's father, maintained a desk in the office, situated to afford him a view of person entering and exiting the Saw Mill premises.

On September 23, 1988, after Detective Bosetti secured a search warrant for the 930 Saw Mill Run premises, he, Detective Quinlan, and a uniformed police officer parked in front of 930 Saw Mill Run. While walking along the side of the building to the back, the officers were able to see Jack Conley and an office in operation behind him. At the same time, Jack Conley saw the uniformed officer and the two detectives. The storm door in the back was closed but unlocked. The inner door was open. Without knocking or otherwise announcing their presence, the officers entered the storage room and walked through the storage room and into the first-floor office area where they identified themselves as police officers and announced that they were there to serve a search warrant. *United States v. Conley*, 856 F. Supp. 1010, 1028-1030 (W.D. Pa. 1994).

In an unpublished memorandum opinion, we rejected a similar claim involving the same entry and search by co-defendant Sheila Smith, who was appealing from an order denying her post-conviction motion under 28 U.S.C. § 2255 to withdraw her guilty plea. *United States v. Smith*, No. 95-3391 (3d Cir. Oct. 24, 1995). There we found that the search was reasonable because the officers entered during daylight and during business hours, the officers entered through an unlocked door, an occupant witnessed the officers approach, the officers announced their presence soon after entry, the entry occurred at a commercial establishment, and the officers were executing a valid

warrant. Conley argues that we should reconsider our decision in *Smith* because there was no purported law enforcement justification for the officers' failure to knock and announce their presence and because the distinction between residential and commercial facility should not justify an illegal search.

In *Wilson* the Court held that "[c]ontrary to the decision below, . . . in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Id.* at 1918.

But as we explained in *Smith*,

> *Wilson* did not establish a *per se* rule that the failure to knock and announce results in evidentiary exclusion . . . . The *Wilson* Court left to lower courts 'the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.'

Slip op. at 7 (citation omitted).

Here the district court found that Conley saw the officers as they approached the back of the building, and that they entered an unlocked door leading to a storage room during daylight hours. When they entered the storage room they announced their presence and the reason they had come. *Conley*, 856 F. Supp. 1028-30. The court also found that the officers did not execute the warrant in a provocative manner likely to lead to violence. In *Smith*, in upholding the search, we indicated that "[a] thoughtful consideration of all these factors led the district court to find that the search . . . was reasonable under the Fourth Amendment, despite the officers' failure to knock on the outer door and announce their presence before entering." *Smith*, slip op. at 8. After considering the record, we independently reach the same result as the *Smith* panel and conclude that the district court properly found that the search was reasonable.

III. CONCLUSION

For the foregoing reasons we will affirm the judgment of conviction and sentence entered September 29, 1995.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Criminal No. 91-178
	)	Criminal No. 94-182
JOHN F. "DUFFY" CONLEY,	)	
	)	
Defendant.	)	

TENTATIVE FINDING OF FACT

July 14, 1995

Following a retrial of charges brought against John F. "Duffy" Conley, the jury returned a verdict finding the defendant guilty of Count One of the indictment at Criminal No. 91-178 which charged the defendant and 22 other defendants with conspiracy (i) to conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business involving video poker machines in violation of the laws of the Commonwealth of Pennsylvania and in violation of Title 18 United States Code, § 1955, and (ii) to knowingly and unlawfully conduct or attempt to conduct financial transactions affecting interstate or foreign commerce, which transactions involved the proceeds of a specified unlawful activity, that is, illegal gambling with video poker machines, knowing that the property involved in such financial transactions represented the proceeds of the illegal gambling activity, with the intent to promote the

carrying on of the specified unlawful activity, illegal gambling with video poker machines, in violation of Title 18 United States Code, § 1956(a)(1)(A)(i).

In Count 2 of the indictment at Criminal No. 91-178, the defendant was charged with the substantive crime of operating an illegal gambling business in violation of Title 18 United States Code, § 1955.

In a separate indictment at Criminal No. 94-182, the defendant was charged with 15 counts of money laundering in violation of Title 18 United States Code, § 1956(a)(1)(A)(i).[1]

Following a nine-week trial, the jury returned a verdict only finding the defendant guilty on Counts One and Two of Criminal No. 91-178. Because the jury could not agree as to the substantive money laundering counts at Criminal No. 94-182, the Court declared a mistrial as to those counts.

Following the recording of the verdict, the government requested the Court to make a ruling with regard to whether the Court finds the defendant guilty of conspiracy to commit money laundering.

The Court declined to do so as it considered such finding part of the sentencing procedure.

So that the Probation Department will be in a position to make a determination of the Guideline range of sentences applicable to the defendant, the Court now deems it appropriate to make a preliminary finding and ruling in that regard.

Discussion

In multiple-object conspiracy cases, the starting point for

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[1]On motion of the government, both indictments were consolidated for trial.

the offense level calculations is U.S.S.G. § 1B1.2(d), entitled "Applicable Guidelines." Effective November 1, 1989, the Guidelines were amended to specifically address multiple object conspiracies by the addition of § 1B1.2(d), which provides:

> (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

U.S.S.G. § 1B1.2(d) (Nov. 1993); *see* U.S.S.G. App. C, amendment 75. The 1989 amendments also added Application Notes 4 and 5, which state in pertinent part:

> 4. . . . Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.
>
> 5. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. *In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.* Note, however,

> if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (*e.g.*, a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct. (Emphasis supplied).

U.S.S.G. 1B1.2(d), Application Notes 4-5 (Nov. 1994).

In November 1989, Application Note 5 was published to account for verdicts that do not reveal the offenses that were the object of the conspiracy. The instant verdict does not reveal which offense(s) is the object of the conspiracy. Appendix C, amendment 75 contains further explanation of the meaning of Application Note 5, stating:

> Additional commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. *Compare United States v. Johnson*, 713 F.2d 633, 645-46 (11th Cir. 1983) (conviction stands if there is sufficient proof with respect to any one of the objectives) *cert. denied sub nom. Wilkins v. United States*, 465 U.S. 1081 (1984) *with United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977) (failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid). In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). *Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were*

> *"sitting as a trier of fact."* The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d) (*e.g.*, fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct. (Emphasis supplied).

U.S.S.G., App. C, amendment 75 (Nov. 1994). It appears that the court, "sitting as a trier of fact," is to make its own assessment of the weight and credibility of the evidence, rather than affording the government the substantial deference of the sufficiency of the evidence standard.

Therefore, pursuant to U.S.S.G. §1B1.2(d), the Court hereby makes the following finding of fact.

Findings of Fact

Employing a "beyond a reasonable doubt" standard, the Court finds that the defendant and his co-conspirators adhered to and/or conspired to commit both of the objects alleged in Count One of the indictment at Criminal No. 91-178, that is, they conspired to operate and conduct an illegal gambling business and to launder the proceeds thereof.

/s/_____
Donald J. Lee
United States District Judge

cc James R. Wilson
Assistant United States Attorney

James A. Wymard, Esquire
220 Grant Street
Pittsburgh, PA 15219

Carl Max Janavitz, Esquire
519 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219

U.S. Probation Office

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3556

UNITED STATES OF AMERICA

v.

JOHN F. "Duffy" CONLEY; WILLIAM C. CURTIN; SHEILA F. SMITH; JOHN FRANCIS "Jack" CONLEY; THOMAS "Bud" MCGRATH; MARK A. ABBOTT; THOMAS ROSSI; WILLIAM STEINHART; ROBERTA FLEAGLE; ROBIN SPRATT; MONICA C. KAIL;WILLIAM J. REED; JOANNE T. SMITH; KENNETH "RON" GOODWIN; LAWRENCE N. "Neudy" DEMINO, SR.; CHRISTOPHER "Chris" KAIL; JOSEPH A. DEVITA; FRANK GAROFALO; THOMAS D. CIOCCO; MICHAEL SUKALY; PHILLIP M. "Mike" FERRELL; ANESTOS "Naz" RODITES; WILLIAM E. RUSIN

JOHN F. "Duffy" CONLEY,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 91-00178-1)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

The petition for rehearing filed by the appellant, John F. "Duffy" Conley, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge McKee would grant rehearing by the court in banc.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: AUG 30 1996

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.

Criminal Action
Nos. 91-178
94-182

JOHN F. "DUFFY" CONLEY,

Defendant.

Transcript of proceedings on June 16, 1995
United States District Court, Pittsburgh, Pennsylvania
before Donald J. Lee, District Judge

APPEARANCES:

For the Government: James Wilson, Esq.
William Braun, Esq.

For the Defendant: James Wymard, Esq.
Carl Janavitz, Esq.
Peter Quijano, Esq.

Court Reporter: Richard T. Ford
1023-B U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

(Proceedings held in chambers; June 16, 1995)

THE COURT: . . . . [Defendant's Proposed Supplemental Jury Instruction No.] 10 is denied, we dealt with that before. I think that is just a matter of sentencing for the Court.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)
	)
vs.	)Criminal No. 91-178
	)Criminal No. 94-182
JOHN F. "DUFFY" CONLEY,	)
	)
Defendant.	)

QUESTIONS OF THE JURY

June 20, 1995, 3:00 p.m.

Question No. 1:

Conspiracy Charge

"Pg. 29 of the following 3 essential elements. In essential 1, A conspiracy etc. to operate an illegal gambling business and to launder proceeds.

"Page 33 Indictment etc. agreed to and/or.

Foreperson,
Dennis Lowrie"

Answer to Question No. 1:

Assuming your question is whether there is an inconsistency in the language at pages 29 and 33 of the

charge, the correct language on page 29 of the charge should read as follows:

> One: A conspiracy, agreement or understanding to operate an illegal gambling business and/or . . . .

You only need to find that the defendant conspired or agreed to accomplish one of the objectives of the conspiracy to convict him of conspiracy. If you find that only one objective of the conspiracy has been proven beyond a reasonable doubt, however, you must agree unanimously as to which objective of the conspiracy the defendant agreed to accomplish.

* * * * *

APPENDIX F

RE: USA V. CONLEY
CR91-178 AND CR94-182
JURY CHARGE

CONSPIRACY - THE ESSENTIAL ELEMENTS OF THE OFFENSE

THE DEFENDANT IS CHARGED WITH CONSPIRACY IN VIOLATION OF 18 U. S. C. § 371. IT IS ALLEGED THAT THE CONSPIRACY HAD TWO OBJECTS. THE FIRST OBJECT WAS TO OPERATE AN ILLEGAL GAMBLING BUSINESS IN VIOLATION OF 18 U. S. C. § 1955. THE SECOND OBJECT WAS TO COMMIT MONEY LAUNDERING IN VIOLATION OF 18 U. S. C. § 1956.

IN ORDER TO SUSTAIN ITS BURDEN OF PROOF FOR THE CRIME OF CONSPIRACY TO OPERATE AN ILLEGAL GAMBLING BUSINESS AND TO LAUNDER THE PROCEEDS THEREFROM, THE GOVERNMENT MUST PROVE THE FOLLOWING THREE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT:

ONE: A CONSPIRACY, AGREEMENT OR UNDERSTANDING TO OPERATE AN ILLEGAL GAMBLING BUSINESS AND TO LAUNDER THE PROCEEDS THEREFROM WAS FORMED, REACHED OR ENTERED INTO BY TWO OR MORE PERSONS;

TWO: AT SOME TIME DURING THE EXISTENCE OR LIFE OF THE CONSPIRACY, AGREEMENT OR UNDERSTANDING, ONE OF ITS ALLEGED MEMBERS KNOWINGLY PERFORMED ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT IN ORDER TO

FURTHER OR ADVANCE THE PURPOSE OF THE AGREEMENT; AND

THREE: AT SOME TIME DURING THE EXISTENCE OR LIFE OF THE CONSPIRACY, AGREEMENT OR UNDERSTANDING, THE DEFENDANT KNEW THE PURPOSE OF THE AGREEMENT, AND THEN DELIBERATELY JOINED THE CONSPIRACY, AGREEMENT OR UNDERSTANDING.

RE: USA V. CONLEY
CR91-178 AND CR94-182
JURY CHARGE

CONSPIRACY - EXISTENCE OF AN AGREEMENT

A CRIMINAL CONSPIRACY IS AN AGREEMENT OR A MUTUAL UNDERSTANDING KNOWINGLY MADE OR KNOWINGLY ENTERED INTO BY AT LEAST TWO PEOPLE TO VIOLATE THE LAW BY SOME JOINT OR COMMON PLAN OR COURSE OF ACTION. A CONSPIRACY IS, IN A VERY TRUE SENSE, A PARTNERSHIP IN CRIME.

A CONSPIRACY OR AGREEMENT TO VIOLATE THE LAW, LIKE ANY OTHER KIND OF AGREEMENT OR UNDERSTANDING, NEED NOT BE FORMAL, WRITTEN OR EVEN EXPRESSED DIRECTLY IN EVERY DETAIL.

TO PROVE THE EXISTENCE OF A CONSPIRACY OR AN ILLEGAL AGREEMENT, THE GOVERNMENT IS NOT REQUIRED TO PRODUCE A WRITTEN CONTRACT BETWEEN THE PARTIES OR EVEN PRODUCE EVIDENCE OF AN EXPRESS ORAL AGREEMENT SPELLING OUT ALL OF THE DETAILS OF THE UNDERSTANDING. WHAT THE GOVERNMENT MUST PROVE IS THAT THERE WAS A MUTUAL UNDERSTANDING, EITHER SPOKEN OR UNSPOKEN, BETWEEN TWO OR MORE PEOPLE TO COOPERATE WITH EACH OTHER TO ACCOMPLISH THE UNLAWFUL ACTS CHARGED IN THE INDICTMENT. TO PROVE THAT A CONSPIRACY EXISTED, MOREOVER, THE GOVERNMENT IS NOT REQUIRED TO SHOW THAT ALL OF THE PEOPLE NAMED IN THE

RE: USA V. CONLEY
CR91-178 AND CR94-182
JURY CHARGE

INDICTMENT AS MEMBERS OF THE CONSPIRACY WERE, IN FACT, PARTIES TO THE AGREEMENT, OR THAT ALL OF THE MEMBERS OF THE ALLEGED CONSPIRACY WERE NAMED OR CHARGED, OR THAT ALL OF THE PEOPLE WHOM THE EVIDENCE SHOWS WERE ACTUALLY MEMBERS OF A CONSPIRACY AGREED TO ALL OF THE MEANS OR METHODS SET OUT IN THE INDICTMENT.

THE GOVERNMENT MUST PROVE THAT TWO OR MORE PERSONS KNOWINGLY AND DELIBERATELY ARRIVED AT SOME TYPE OF AGREEMENT OR UNDERSTANDING THAT THEY, AND PERHAPS OTHERS, WOULD OPERATE AN ILLEGAL GAMBLING BUSINESS AND LAUNDER THE PROCEEDS THEREFROM BY MEANS OF SOME COMMON PLAN OR COURSE OF ACTION AS ALLEGED IN COUNT 1 OF THE INDICTMENT FILED AT CRIMINAL NO. 91-178. IT IS PROOF OF THIS CONSCIOUS UNDERSTANDING AND DELIBERATE AGREEMENT BY THE ALLEGED MEMBERS THAT SHOULD BE CENTRAL TO YOUR CONSIDERATION OF THE CONSPIRACY CHARGE.

UNLESS THE GOVERNMENT PROVES BEYOND A REASONABLE DOUBT THAT A CONSPIRACY, AS JUST EXPLAINED, ACTUALLY EXISTED, THEN YOU MUST ACQUIT THE DEFENDANT.

THE INDICTMENT ALLEGES THAT THE CONSPIRACY INVOLVED AN AGREEMENT TO DO TWO THINGS: OPERATE AN ILLEGAL GAMBLING

RE: USA V. CONLEY
CR91-178 AND CR94-182
JURY CHARGE

BUSINESS AND ENGAGE IN MONEY LAUNDERING. ACCORDINGLY, THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT TWO OR MORE PERSONS AGREED TO:

(A) CONDUCT, FINANCE, MANAGE, SUPERVISE, DIRECT OR OWN ALL OR PART OF AN ILLEGAL GAMBLING BUSINESS; AND/OR

(B) ENGAGE IN MONEY LAUNDERING BY CONDUCTING FINANCIAL TRANSACTIONS INVOLVING THE PROCEEDS OF THE DEFENDANT'S VIDEO POKER MACHINE GAMBLING BUSINESS WITH THE INTENT TO PROMOTE THE CARRYING ON OF THE DEFENDANT'S VIDEO POKER MACHINE GAMBLING BUSINESS.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOHN F. "DUFFY" CONLEY,
Defendant.

Criminal Action
Nos. 91-178
94-182

Transcript of proceedings on June 20, 1995
United States District Court, Pittsburgh, Pennsylvania
before Donald J. Lee, District Judge

(Court reconvened at 4:10 p.m. in chambers.)

. . . .

MR. JANAVITZ: Oh, but the problem is, here's where I foresee the problem on the conspiracy, because it is going to raise its ugly head again, and this is why I asked, both the last time and this time, that a separate slip be — that a special verdict slip be prepared in terms of which they found so that the Court will know without having to make

a blind finding later if they find guilt of conspiracy, just — conspiracy, just which one they did.

Now, if the Court now instructs them, as we are requesting the Court to do, that in order to find him guilty of conspiracy to commit money laundering, they have to find he had the requisite knowledge, I think we're one step closer to knowing what they did, especially if they were to find him not guilty of money laundering and find him guilty of the conspiracy.

THE COURT: First of all, it's improper for me to do that. I'm required under the Sentencing Guidelines to make that determination, and the proof with regard to which object the defendant and the other co-conspirator or conspirators agreed on has to be established by beyond a reasonable doubt. It is not a preponderance of the evidence.

So, under the guidelines, I make that determination later. If they find him guilty of Count 1, then it's up to me, and

me only, to make that determination

What's your position on that?

MR. WILSON: I have nothing to add to that, Judge.

THE COURT: Well, do you agree with that?

MR. WILSON: Yes. Absolutely. We discussed this before.

THE COURT: Yes.

Supreme Court, U.S.
FILED
JAN 29 1997
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No. 96-868

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN CONLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when the jury has returned a general verdict of guilty on a count charging a multiple-object conspiracy, the district court may determine which offenses were the objects of the conspiracy for purposes of imposing sentence under the Sentencing Guidelines.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-868

JOHN CONLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 92 F.3d 157. The district court's finding that petitioner committed both offenses that were charged as objects of the conspiracy (Pet. App. A29-A33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. The petition for rehearing was denied on August 30, 1996. Pet. App. A35-A36. The petition for a writ of certiorari was filed on November 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to commit an offense against the United States, in violation of 18 U.S.C. 371; and of the substantive offense of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. He was sentenced to consecutive prison sentences of 60 months on each count and fined $1 million. The court of appeals affirmed. Pet. App. A1-A28.

1. The evidence showed that petitioner owned the largest video poker machine business in the Pittsburgh, Pennsylvania area. He operated his gambling business by purchasing video poker machines equipped for gambling and putting them in business establishments knowing that they would be used for gambling. Petitioner expanded his gambling business by hiring employees to solicit new locations, to move and service his machines, and to collect his share of the proceeds. Petitioner also purchased his own buildings and businesses to house his machines and paid salaries to his employees at these locations. Between 1985 and 1990, he or his employees deposited more than $10 million in bank accounts, approximately 93-94% of which was derived from video poker machine gambling. Pet. App. A3-A4.

Petitioner took steps to thwart investigation of his gambling activities by local, state, and federal law enforcement personnel. For example, petitioner reorganized his gambling business to conceal his involvement; he had informants warn him of impending law enforcement raids so that the video poker machines could be removed; he instructed his employees on a

new method of taking readings from the machines to prevent law enforcement authorities from obtaining the readings; he ceased having the gambling proceeds delivered to his office; and he instituted a policy barring location owners and operators from making payoffs to persons they did not know. On one occasion, petitioner secretly entered a location secured by United States marshals and removed knock-off devices from video poker machines seized from him. Pet. App. A5-A6.

2. After the district court denied petitioner's request for a special verdict on the conspiracy count that would have required the jury to express its finding with respect to each charged object offense, the jury entered a general verdict of guilty on that count. Section 1B1.2(d) of the Sentencing Guidelines provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application Note 5 of the Guideline addresses the situation, such as that presented here, in which the verdict does not establish which offense or offenses was the object of the conspiracy. The note states that "[i]n such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." The Guidelines provide that the sentencing court's decision of whether the defendant committed an object offense is governed by the reasonable-doubt standard. See United States Sentencing Comm'n, *Guidelines Manual*, App. C., Amend. 75 (1995).

At sentencing, the district court, employing the reasonable-doubt standard, found that petitioner conspired to commit both of the object offenses alleged in the conspiracy count—conducting an illegal gambling business and money laundering. Pet. App. A33. The court determined that petitioner conspired to commit money laundering notwithstanding the jury's inability to reach a verdict on the substantive money laundering offenses charged against him. *Id.* at A8-A9.

Having found that petitioner conspired to commit both the gambling object and the money laundering object, the district court grouped the two offenses pursuant to Section 3D1.2(b) of the Guidelines. Pet. App. A9. With respect to grouped counts, courts must determine the base offense level for the most serious of the counts in the group. Guidelines § 3D1.3. Because the base offense level for money laundering under Section 2S1.1 is greater than that for conducting an illegal gambling business under Section 2E3.1, the court used the base level contained in the money laundering guideline. The court found that petitioner had conspired to launder in excess of $10 million. Accordingly, the court increased the base offense level under Section 2S1.1(b)(2) by nine levels. After adjusting the offense level upward an additional six levels for role in the offense (Guidelines § 3B1.1(a)) and obstruction of justice (Guidelines § 3C1.1), the court sentenced petitioner to 60 months' imprisonment on both counts, the maximum sentences allowed under 18 U.S.C. 371 and 18 U.S.C. 1955. Because the maximum sentences authorized by these statutes were less than the minimum sentences called for by the Guidelines, the court directed that

petitioner serve the sentences consecutively. See Pet. App. A9-A10 (applying Guidelines § 5G1.2(d)).

3. On appeal, petitioner contended that his Sixth Amendment right to a jury trial and his Fifth Amendment right to due process were violated when the district court calculated his offense level under the more severe money laundering guideline, because the jury did not specify the object of the conspiracy for which it convicted him, and because the jury failed to reach a verdict on the substantive money laundering counts. Pet. App. A10.

With respect to petitioner's Sixth Amendment claim, the court of appeals began by observing that, in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court "permitted a state to treat conduct which arguably was an element of a criminal offense, the visible possession of a weapon during certain offenses, as a sentencing factor." Pet. App. A15. The court then concluded that "making the object of a conspiracy charged under 18 U.S.C. § 371 a matter for the sentencer rather than an element of the crime" likewise does not violate the Sixth Amendment. *Id.* at A17. The court reasoned (*id.* at A16-A17) that

> [i]f * * * it were constitutionally impermissible to treat the object of a multi-object conspiracy indictment as a sentencing factor rather than as an element of the crime, then it is difficult to understand how [this Court in *Griffin* v. *United States*, 502 U.S. 46 (1991)] * * * could have permitted a conspiracy conviction to stand when there was insufficient evidence to support a conviction for one of the objects. After all, if each object of the conspiracy had been an element of the crime then under well-established law the

> defendant in *Griffin* would have been entitled to an acquittal since the proofs could not support the charge that she conspired with respect to one object.

In support of its holding, the court cited *United States* v. *Martinez*, 924 F.2d 209, 211 (11th Cir.), cert. denied, 502 U.S. 870 (1991), for the proposition that, because the Guidelines do not alter the maximum sentence for an offense but merely limit the court's discretion in selecting a penalty within the statutory range, "there is no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor convicted, so long as proof of that conduct is supported by reasonable indicia of reliability." Pet. App. at A17-A18 (quoting *Martinez*, 924 F.2d at 211).

The court of appeals also rejected petitioner's due process claim. The court observed that the state statute upheld by this Court in *McMillan* required that the existence of the sentencing factor at issue there—whether the defendant visibly possessed a gun during the crime—be determined by a preponderance of the evidence. Pet. App. A20. The court then concluded that by determining the objects of the conspiracy beyond a reasonable doubt, the district court here "met whatever procedural standard which might have been required." *Id.* at A21.

ARGUMENT

Petitioner contends that the procedure set forth in Section 1B1.2 of the Guidelines, as explained in Application Note 5, violates the Due Process Clause of the Fifth Amendment and the Sixth Amendment jury trial right because it authorizes the district court rather than the jury to determine the object of a

conspiracy. Accordingly, petitioner argues that the district court exceeded its constitutional power at sentencing by determining itself that he conspired to commit both the gambling and money laundering objects, and then in sentencing him by employing the higher base offense level for money laundering. In petitioner's view, when faced with a general verdict of guilty in a multiple-object conspiracy case, the sentencing court is required to impose a sentence based on the least serious object. Petitioner further contends that the result in this case would have been different under decisions by the Eighth and Tenth Circuits and that this Court should grant certiorari because of that conflict. Those contentions are without merit.

1. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court reaffirmed the long-established rule that a general verdict of guilty on a multiple-object conspiracy count may stand "so long as it [is] legally supportable on one of the submitted [objects]—even though that [gives] no assurance that a valid [object], rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. It is also well-established that the legislature may enumerate a factor to be found by the sentencer that was not stated as an element of the offense on which the trier of fact convicted the defendant. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 93. Furthermore, a sentencing court has discretion to take into account a range of information—including evidence introduced at trial for offenses on which the defendant was ultimately acquitted—to determine the appropriate sentence for offenses on which the jury convicted the defendant. *United States* v. *Watts*, No. 95-1906 (Jan. 6, 1997) (per curiam), slip op. 3. From these decisions, it follows a

fortiori that the district court in sentencing the defendant may also consider charged conduct with respect to which the jury is not required to make a finding in order to convict.

In determining at sentencing that petitioner conspired to commit the money laundering object, the district court did not invade the province of the jury and decide an element of the offense. The general conspiracy statute pursuant to which petitioner was convicted, 18 U.S.C. 371, makes it a crime to conspire to commit any offense against the United States and to perform an overt act to effect the object of the conspiracy. Accordingly, an element of a multiple-object conspiracy offense is that the defendant conspired to commit one or more of the charged objects. The jury in this case could not have convicted petitioner on the conspiracy count had it not found beyond a reasonable doubt all of the elements of conspiracy specified in Section 371. The district court did not perform a jury function and determine an element of the offense, however, when it concluded during the sentencing phase that petitioner conspired to commit the money laundering object.

The Sentencing Commission could have chosen any of a number of ways for courts to calculate the sentence for a Section 371 conspiracy. The fact that it decided to base the sentence on a factor that happens to mirror a determination made by the jury does not mean that the factor is any less an issue for the court at sentencing than if the sentence were governed by some other factor not determined by the jury, such as the number of participants in the conspiracy. In a multiple-object conspiracy case, it is the jury's role under the Sixth Amendment to determine whether the defendant is guilty of conspiring to commit a

charged object; once that determination is made, it is properly the court's role to determine which charged objects were sufficiently proved to serve as a basis for the sentence. See *McMillan* v. *Pennsylvania*, 477 U.S. at 93 ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."); *United States* v. *Chapple*, 985 F.2d 729, 731 (3d Cir.) (the district court is not bound by the jury's findings regarding sentencing factors), cert. denied, 508 U.S. 980 (1993). In applying the Guidelines in this case, therefore, the court below committed no error under the Fifth and Sixth Amendments.

2. Petitioner cites (Pet. 22-23) several cases holding that the punishment imposed after a general verdict of guilty in a multiple-object conspiracy case, where the punishment authorized by the conspiracy statute depends on the punishment authorized for the object offenses, may not exceed the maximum penalty authorized by statute for the less serious object offense. See, *e.g.*, *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Quicksey*, 525 F.2d 337, 340 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976). The underlying concern in these cases, which were decided before the advent of the Sentencing Guidelines, arises when a court attempts to impose a sentence above the statutory maximum applicable to the crime for which the defendant was convicted. As the court of appeals explained, that danger is not present here. Pet. App. A13-A14. The maximum statutory sentence to which petitioner is exposed does not depend on the punishment authorized under the Sentencing Guidelines for the object offenses; rather, the maximum sentence has been imposed by Section 371

as five years—regardless of the object on which the jury relied to convict the defendant under Section 371.[1]

Petitioner cites (Pet. 18-20) two cases as conflicting with the decision below and as support for his position. In both *United States* v. *Pace*, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993), and *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990), the defendants were charged with conspiring to traffic in "methamphetamine/amphetamine" under 21 U.S.C. 846, the conspiracy provision applicable to drug offenses.[2] The juries returned a general verdict that did not specify which drug was the object of the conspiracy. The district courts in those cases found that the drug involved was methamphetamine, and consequently sentenced the defendants under the Sentencing Guidelines to longer jail terms than would have been prescribed if the drug had been found to be amphetamine. The courts of appeals vacated the sentences, concluding that the defendants should have been sentenced under the guideline yielding the less

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[1] Section 371 of Title 18 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

[2] Section 846 of Title 21 provides, in pertinent part:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

severe penalty. 981 F.2d at 1130; 904 F.2d at 415. Both courts of appeals rested their holdings on the fact that it was not clear from the jury's verdict on which drug—methamphetamine or amphetamine—the convictions rested.

Pace and *Owens* are inapposite to the instant case.[3] First, the conspiracy provisions in 21 U.S.C. 846 and 18 U.S.C. 371 differ insofar as Section 846 directs the sentencer to impose the penalty applicable for the underlying substantive offense, whereas Section 371 provides generally that persons convicted under that provision shall receive a maximum penalty of five years' imprisonment irrespective of the penalty prescribed for the underlying offense that was the object of the conspiracy. That distinction is important, because a conviction under Section 846 points to the penalty imposed by the underlying object offense, whereas Section 371 does not. Because *Pace* and *Owens* arose under Section 846, they do not present a direct conflict with petitioner's case, which arises under Section 371.

Second, it is questionable whether *Pace* and *Owens* represent definitive statements of law in the Eighth and Tenth Circuits on whether a jury—as opposed to the sentencing court—must find the requisite facts

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[3] Petitioner also cites (Pet. 18) as conflicting *United States* v. *Bush*, 70 F.3d 557 (10th Cir. 1995). That case is distinguishable because it involved the adequacy of a guilty plea, and the issue was whether the defendant had intentionally pleaded guilty to the charge under 21 U.S.C. 846 involving a particular drug. Although the court of appeals relied on its analysis in *Pace*, 70 F.3d at 559-560, the issue of a defendant's intent to plead guilty to a Section 846 conspiracy has no bearing on what facts the jury is required to find beyond a reasonable doubt in a prosecution brought under 18 U.S.C. 371.

to sustain imposition of a sentence for conspiracy that rests on a conviction for acts whose objects were violations of substantive offenses. Other cases in those circuits support the government's position that the sentencer may find the requisite facts, as the district court did below. For example, in *United States* v. *Koonce*, 884 F.2d 349, 352-353 (8th Cir. 1989), the evidence clearly established that the defendant was involved in methamphetamine trafficking, but there was a dispute as to whether the methamphetamine was of the "Dextro" or "Levo" variety. As in *Owens*, different drug conversion ratios applied depending on the type of methamphetamine at issue. The sentencing court found it "more likely" that the methamphetamine was of the more severely penalized "Dextro" variety and sentenced the defendant accordingly. The court of appeals affirmed that finding as not clearly erroneous. *Id.* at 353. Cf. *United States* v. *Lopez*, 42 F.3d 463, 470 (8th Cir. 1994) ("For sentencing purposes, the court, not the jury, determines the quantity [of drugs]."); *United States* v. *Mabry*, 3 F.3d 244, 250 (8th Cir. 1993) (jury need not be instructed on quantity of drugs), cert. denied, 114 S. Ct. 1403 (1994); *United States* v. *Wood*, 834 F.2d 1382, 1389-1390 (8th Cir. 1987) (for sentencing purposes, the court, not the jury, determines drug quantity).

Similarly, in *United States* v. *Slater*, 971 F.2d 626 (10th Cir. 1992), the defendant contended that the district court incorrectly sentenced him on the basis of cocaine base instead of powder cocaine, which would have yielded a shorter sentence under the Guidelines. In rejecting that claim, the court of appeals relied on the district court's finding at sentencing that all of the transactions involved cocaine base. *Id.* at 639. See also *United States* v. *Deninno*, 29 F.3d 572, 580

(10th Cir. 1994) ("The government has the burden of proof and production during the sentencing hearing to establish the amounts and *types* of controlled substances related to the offense.") (emphasis added), cert. denied, 115 S. Ct. 1117 (1995).

Koonce, *Slater*, and the other cases cited above recognize that neither the type nor quantity of the illicit drug is an element of an offense under Section 841(a)(1), which prohibits only trafficking in "controlled substance[s]." Rather, it is exclusively in Section 841(b) that drug type and quantity are addressed, and that is for the purpose of prescribing penalties. See *Wood*, 834 F.2d at 1388-1389. Thus, in those cases, the courts correctly recognized that the sentencer may make factual findings that bear on the severity of punishment when the verdict on the offense of conviction does not entail a jury finding on those issues. Accordingly, petitioner is mistaken in contending that "he assuredly could not have been so sentenced by a court in the Eighth or Tenth Circuits." Pet. 30. Accord *United States* v. *Gomez*, 905 F.2d 1513, 1514-1515 (11th Cir. 1990), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Levy*, 904 F.2d 1026, 1034 (6th Cir. 1990), cert. denied, 498 U.S. 1091 (1991); *United States* v. *Barnes*, 890 F.2d 545, 551 & n.6 (1st Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

On the narrow issue actually presented by the petition—whether the sentence in this case under 18 U.S.C. 371 was constitutionally imposed—petitioner can present no conflict among the courts of appeals or other reason warranting this Court's review. Because divergent cases within the Eighth and Tenth Circuits arising under the drug conspiracy statute (21 U.S.C. 846) have no bearing on the proper outcome of this case, this Court should give those circuits an

opportunity to reconcile the tension among those precedents before granting review, or it should await an appropriate case that implicates that statute before granting plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-868

IN THE
Supreme Court of the United States
October Term, 1996

JOHN CONLEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

The Acting Solicitor General concedes that this Court should "gran[t] plenary review" in an "appropriate" case to address the important constitutional issue implicated in this case, see Brief in Opposition ("Opp. Cert.") 14, and does not contest that the question presented involves an issue of "great practical importance" to the administration of the federal criminal justice system. See Cert. Pet. 24. The Government's arguments against granting review, Opp. Cert. 10-14, are conspicuously unconvincing and only confirm that a Circuit conflict on this issue is squarely presented here and that this is, indeed, an appropriate case for its resolution. Certiorari therefore should be granted.

1. The Government first argues, see Opp. Cert. 11, that *United States* v. *Pace*, 981 F.2d 1123 (CA10 1992), cert. denied, 507 U.S. 966 (1993), and *United States* v. *Owens*, 904 F.2d 411 (CA8 1990), do not conflict with the decision below because they involved prosecutions under the conspiracy statute "applicable to drug offenses," Opp. Cert. 10, 21 U. S. C. § 846, while the instant case is a prosecution under the more generally applicable conspiracy statute, 18 U. S. C. § 371.

Not a word is said to explain why this difference in the factual settings of the cases might be thought to have the slightest significance. See Opp. Cert. 11. The object offenses charged in *Pace* and *Owens* were drug offenses, and the defendants were of course prosecuted under the drug conspiracy statute. Because the object offenses in this case were not drug offenses, prosecution was brought under the general conspiracy statute.

But the statutes are *identical* in the relevant respect that they criminalize conspiracies to commit various offenses against the United States.[1] The question presented for

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[1] 21 U. S. C. § 846 happens to be limited to conspiracies to commit "any offense defined in [the Drug Abuse Prevention and Control Subchapter]"; 18 U. S. C. § 371 is more broad, covering conspiracies to commit "any offense against the United States."

decision involves whether the Fifth and Sixth Amendments permit a judge in a multi-object conspiracy case to determine the object of the conspiracy and to impose the legally-mandated Guidelines sentence for the resultant offense of conviction when confronted with a general verdict that is ambiguous as to the object found by the jury. It is that constitutional question that was decided in *Pace* and *Owens* (and on which the Courts of Appeals are now split), not some question of statutory construction that might be limited to one or the other conspiracy statute.[2] The decision below thus can no more be distinguished from *Pace* and *Owens* on the ground that those cases involved drug prosecutions under 21 U. S. C. § 846, while this one involved an illegal gambling prosecution under 18 U. S. C. § 371, than it can be distinguished on the ground that those cases arose in Oklahoma and Iowa, while this one arose in Pennsylvania.

The complete irrelevance of the distinction suggested by the Government is reflected in the Sentencing Guidelines. Application Note 5 to Guidelines Section 1B1.2(d) applies to ambiguous multi-object conspiracy convictions under *either* statute. Thus the procedure challenged in the instant case — under which the judge determines the object offense under the reasonable-doubt standard — is authorized identically by the Guidelines in prosecutions brought under either conspiracy statute. *United States* v. *Bush*, 70 F.3d 557 (CA10 1995), cert. denied, 116 S. Ct. 795 (1996), in which the Tenth Circuit explained that its decision in *Pace* means that the Constitution prohibits the

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[2] And of course the resolution of such a constitutional question rendered in a prosecution under the one statute controls in prosecutions under the other. See, *e.g.*, *Pace*, 981 F.2d at 1123 (applying this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), an 18 U. S. C. § 371 prosecution, in a prosecution brought under 21 U. S. C. § 846).

procedure authorized by Application Note 5 to Guidelines Section 1B1.2(d), see 70 F.3d at 561-562, involved a prosecution under 21 U. S. C. § 846; the instant case, in which that same procedure was upheld by the Third Circuit, was brought under 18 U. S. C. § 371.

The Government does point out that, under 21 U. S. C. § 846, the maximum statutory penalty is the penalty for the underlying object offense, while, under 18 U. S. C. § 371, the maximum statutory penalty is five years' imprisonment regardless of the underlying object offense. Opp. Cert. 11. This is true but again wholly irrelevant. Neither *Pace* nor *Owens* turned on the imposition of a sentence that would have been above the statutory maximum, see Cert. Pet. 22, and both decisions make clear that they involve only the question of whether, in an ambiguous-general-verdict situation, the court may use the Guidelines-mandated sentence for conviction of conspiracy to commit the more serious object offense.

2. The Government also contends that "it is questionable whether *Pace* and *Owens* represent definitive statements of law in the Eighth and Tenth Circuits," Opp. Cert. 11-12, because there is a "tension among th[e] precedents" within these two Circuits. Opp. Cert. 14.

There is absolutely no support for this assertion. The legal question that the Government contends is drawn into doubt by the cases it cites is

> whether a jury — as opposed to the sentencing court — must find the requisite facts to sustain imposition of a sentence for conspiracy that rests on a conviction for acts whose objects were violations of substantive offenses.

Opp. Cert. 11-12. But, to begin with the Eighth Circuit, the case cited by the Government, *United States* v. *Koonce*, 884 F.2d 349 (CA8 1989) — which was decided by that court *before* it decided *Owens* — *does not even involve a*

conspiracy conviction. And *United States* v. *Slater*, 971 F.2d 626 (CA10 1992), the Tenth Circuit decision on which the Government relies — and which, similarly, came *before Pace* — does not involve a judicial finding of the object of the conspiracy in that case. Further, neither decision even *addresses* the propriety of a judge, rather than the jury, making the findings to which the Government points.

And, even if those decisions had addressed that question, so that they might be said to stand for approval of the procedure followed in those cases — and even if those cases could somehow call into question the Courts of Appeals' more recent and definitive statements in *Pace* and *Owens* — the judicial findings concerning the form or quantity of drugs made in those cases have nothing to do with the type of finding at issue in *Pace*, *Owens* and the instant case: a judicial finding of the object of a conspiracy made in the face of an ambiguous general verdict in a multi-object conspiracy case.

Indeed, the cases on which the Government relies *all* involve only a determination by the district court for sentencing purposes of the quantity or form of a given type of drug involved in an unambiguous drug conviction. (These are determinations that district courts routinely make under Guidelines Section 2D1.1.) None of the cases cited by the Government can undermine *Pace* or *Owens* because none involved a finding of the object of a conspiracy. Indeed, none involved even a parallel situation (one that might be similar in principle) in which an ambiguity in a verdict is resolved by a judicial finding of an element of the offense — that is, a judicial finding as to a precise matter (such as, in the instant case, the conspiracy's object — illegal gambling, or money laundering), as to which the jury would properly have been instructed (as the jury was here) that it *had to agree unanimously*. See Cert. Pet. 5-6. Rather, in *every case* cited by the Government, the district court was faced with an

unambiguous verdict, and the quantity or form of the proscribed type of drug was *not* an element of the offense.

As to the Eighth Circuit, *United States* v. *Koonce*, on which the Government primarily relies, involved an unambiguous verdict that the defendant "unlawfully, knowingly and intentionally distribut[ed] or caused to be distribut[ed] or attempted to distribute methamphetamine." 884 F.2d at 350. At sentencing, as part of its calculation of the base offense level under Guidelines Section 2D1.1(a)(3), see 884 F.2d at 352 n.4, the court determined the particular isomer of methamphetamine involved in the case. But the *chemical form* of the methamphetamine was not an element of the offense, *e.g.*, *United States* v. *Deninno*, 29 F.3d 572, 579-580 (CA10 1994), cert. denied, 115 S.Ct. 1117 (1995), and the court was engaged in establishing *not* the offense of conviction — as to which there was no doubt — but the total quantity of the drugs that "were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2). In evaluating the Guidelines implication of a particular quantity of methamphetamine, the Drug Equivalency Tables in § 2D1.1 that were applicable in *Koonce* required a determination of whether the methamphetamine involved in the relevant transactions was simple "methamphetamine" (that is, D- or Dextro-methamphetamine), or methamphetamine of the "L-methamphetamine/Levo-methamphetamine" variety. See USSG § 2D1.1, comment., n.10 (Revised ed. 1988) (Drug Equivalency Tables) (treating one gram of each isomer as the equivalent of a different amount of cocaine).[3] This determination, made

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[3] The Drug Equivalency Tables have not treated L-methamphetamine as a distinct substance since November 1, 1995. Under Amendment 518 to the Guidelines, the reference to L-methamphetamine was deleted, United States Sentencing Commission, Guidelines Manual, App. C. Amend. 518 (USSG 1995), so that "all forms of methamphetamine" are

for purposes of applying the Drug Equivalency Tables, was the only one made by the district court in *Koonce*.

And indeed, the other Eighth Circuit cases cited by the Government all found a judge's determination at sentencing of the quantity of drugs involved (or, in the case of *United States* v. *Mabry*, 3 F.3d 244 (CA8 1993), cert. denied, 114 S.Ct. 1403 (1994), the failure to instruct the jury to make a finding as to quantity) to be unproblematic precisely because — unlike the instant case — the judge was not making a finding of one of the elements of the offense of conviction. See *United States* v. *Lopez*, 42 F.3d 463, 470 (CA8 1994) ("[Q]uantity . . . was not an element of the offense . . . . For sentencing purposes, the court, not the jury determines quantity.") (citations omitted); *Mabry*, 3 F.3d at 250 ("Quantity matters only for purposes of sentencing. . . . As we have repeatedly held . . quantity is not an element of this offense.") (citations omitted); *United States* v. *Wood*, 834 F.2d 1382, 1390 (CA8 1987) (quantity is "a particular fact relevant to sentencing," not "an element of the substantive offense").

As to the Tenth Circuit, the *Slater* case cited by the Government is equally irrelevant. The convictions there were again unambiguous ones, one for possession with intent to distribute cocaine base within 1,000 feet of a public elementary school, and one for conspiracy to possess with intent to distribute cocaine base. See *Slater*, 971 F.2d at 629-630. The district court's finding, made in determining the weight of the drugs involved, was simply that all the transactions involved cocaine base, and thus were appropriately included in determining the total quantity of the drugs involved in the offense of conviction. See *id.*, at 639. (And again, as in *Koonce*, the propriety of

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now "treated alike." See *id.* (commentary accompanying promulgation of Amendment 518).

the judge making this finding was not even at issue in the case. It was merely described in passing by the Court of Appeals. See 971 F.2d at 639.) *Slater* thus did not involve an ambiguous verdict, nor did it involve a determination by the judge of an element of the offense. And indeed, the other Tenth Circuit case cited by the Government — another case involving L-methamphetamine vs. D-methamphetamine — states that the type of methamphetamine may be "proved by a preponderance of the evidence at sentencing" precisely "*[b]ecause* the type of methamphetamine is not an element of the crime." *United States* v. *Deninno*, 29 F.3d at 580 (CA10 1994) (citations omitted and emphasis added); see *id.*, at 579-580 ("The government . . . had no duty to prove the type of methamphetamine. To convict a defendant, the prosecution must prove, beyond a reasonable doubt, only that the substance was generically methamphetamine.").

Petitioner obviously does not contend that there is something inherently improper about the district court making factual findings at sentencing that will result in determination of a Guidelines base offense level. See Cert. Pet. 28 (specifically citing Guidelines §2D1.1(a)(3)). Determinations of the form and quantity of drugs made at sentencing in cases of unambiguous verdicts — cases of the sort cited by the Government — have nothing whatever to do with the judicial determination, in a multi-object conspiracy case in which the verdict is ambiguous, of the object offense itself, and with the imposition of the legally-mandated sentence for the resultant offense of conviction. It is this latter type of determination that was held impermissible in *Pace* and *Owens*, but upheld in the instant case. See, *e.g.*, *United States* v. *Bush*, 70 F.3d 557, 561 (CA10 1995) (under *Pace*, "if a jury returns a general verdict which does not specify the object of a conspiracy, the defendant must be sentenced on the basis of the objective yielding the lowest offense level" "[b]ecause the

object of a conspiracy is an element of the offense");[4] *Owens*, 904 F.2d at 414-415 ("The general verdict form . . . did not allow the jury to indicate which of the two drugs it found to be the object of the conspiracy. . . . [T]he district court elicited an ambiguous verdict of guilty with two possible alternative interpretations. Under the circumstances of this case, the district court erred in sentencing Owens based on the alternative which yielded the higher sentencing range.").

Nothing cited by the Government even remotely calls into question the Eighth Circuit's decision in *Owens* or the Tenth Circuit's decision in *Pace*, each of which is in conflict with the decision below.[5] Its argument that this Court should await further developments in those Circuits before granting review, Opp. Cert. 13-14, is utterly unsupported.

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[4] Although petitioner need not rely on the Tenth Circuit's decision in *Bush* to demonstrate the split among the Circuits, we note that the Government is incorrect in its conclusion that *Bush* "is distinguishable because it involved the adequacy of a guilty plea." Opp. Cert. 11 n. 3. The Tenth Circuit was faced in *Bush* with an allegation that it was "impossible to determine with a reasonable degree of certainty, either based on the indictment, the plea agreement, the petition for entry of a guilty plea, the colloquy at the change of plea hearing, the sentencing hearing, or some other part of the record," what the object was of the conspiracy to which the defendant in that case had pled guilty. *Bush*, 70 F.3d at 561. The Court of Appeals concluded that "there is no principled distinction between a jury verdict which does not specify the object of a conspiracy and a guilty plea which does not specify the object of a conspiracy" and that, consequently, "our analysis in *Pace* applies equally to both situations." *Id.* Application Note 5 to Guidelines Section 1B1.2(d) also clearly applies both to convictions after trial and to guilty pleas. See USSG § 1B1.2, comment., n. 5 ("Particular care must be taken in applying subsection (d) because there are cases in which the *verdict or plea* does not establish which offense(s) was the object of the conspiracy.") (emphasis added).

[5] Nor does the Government contest petitioner's assertion, Cert. Pet. 23, that the decision below cannot be squared in principle with decisions of the Second, Fourth, Ninth and D.C. Circuits. See Opp. Cert. 9-10.

3. Finally, although its argument has no bearing on the question of whether review is warranted to address the Circuit conflict implicated in this case, the Government contends that, on its merits, the decision below is correct because it follows "*a fortiori*" from this Court's decisions in *Griffin* v. *United States*, 502 U.S. 46 (1991), *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986) and *United States* v. *Watts*. 65 U.S.L.W. 3461 (U.S. Jan. 6, 1997) (per curiam).

This is demonstrably incorrect. *Griffin* held that a general verdict of guilt in a multi-object conspiracy case could be upheld even when the evidence was insufficient as to one of the object offenses. See 502 U.S. at 56-60. Petitioner does not argue with this ruling, nor does he deny that the jury in the instant case found that he conspired to commit at least *one* of the object offenses charged in the indictment. He contends only that in the case of an ambiguous verdict, because of the Fifth and Sixth Amendments, the verdict may not be treated as though it were a conviction for conspiracy to commit the greater object offense. *Griffin* says nothing at all about this issue.

McMillan held that, within certain limits, a legislature may provide for "a sentencing factor" that "is not an element of" the offense, 477 U.S. at 85-86, to be found by the judge at sentencing. Again, petitioner has no quarrel with that ruling. In this case, however, the judge did not find a mere sentencing factor. The Guidelines applicable to this case do not create "a factor that happens to mirror a determination made by the jury," Opp. Cert. 8, and the Government points to no provision that purports to do so. Instead, the Guidelines impose sentence on the basis of the "offense of conviction." See Cert. Pet. 8-9, 28-29. Respect for the Guidelines as a statement of law requires recognition of this distinction. In this case, the offense of conviction — conspiracy to launder money — was established by a beyond-a-reasonable-doubt finding by the judge and not the jury. The judge thus did not find a

sentencing factor; precisely as the Sentencing Commission intended, he "creat[ed] . . . what is, in effect, *a new count of conviction*." United States Sentencing Commission, Guidelines Manual, App. C., Amend. 75 (1995 USSG) (emphasis added).

The Government also relies on *United States* v. *Watts*. But petitioner has never argued that his case implicated the split in authority that *Watts* resolved, see Cert. Pet. at 28-29 n. 12, and that *per curiam* opinion accordingly has no bearing here. *Watts* held that the district court may take into consideration — in determining the presence or absence of a sentencing factor — conduct that underlay charges of which the defendant was acquitted. But the object offense in this case, as we have seen, was not employed by the Guidelines as a mere sentencing factor — a "sentencing enhancemen[t]" that simply "increase[d] [petitioner's] sentence because of the manner in which he committed the crime of conviction." *Watts*, 65 U.S.L.W. at 3462. Rather, this case involved a finding by the judge of what the very crime of conviction *was*. This case, in short, involves a judicial *conviction* — not just a sentencing determination.

CONCLUSION

This case implicates an important constitutional issue on which the Courts of Appeals are divided. Certiorari therefore should be granted.

Respectfully submitted,

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